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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD R. COLE,

Petitioner,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Where the Court of Veterans Appeals refuses to rule on a Veteran's properly presented appeal and instead remands in violation of an express statutory bar, is the Veteran entitled to an immediate appeal under the collateral-order doctrine, contrary to the holding of the Federal Circuit that a remand can never satisfy the criteria established in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 16

APPENDIX:

- Opinion of the United States Court of Appeals for the Federal Circuit in *Edward R. Cole v. Jesse Brown, Secretary of Veterans Affairs*, dated February 4, 1994 . . . . . 1a
- Order of the United States Court of Veterans Appeals in *Edward R. Cole v. Jesse Brown, Secretary of Veterans Affairs*, dated April 13, 1993. . . . . 8a
- Decision of the Board of Veterans' Appeals in *Edward R. Cole v. Jesse Brown, Secretary of Veterans Affairs*, dated April 3, 1992 . . . . . 10a
- Department of Veterans Affairs Rating Decision Sheet of Edward R. Cole. 18a
- Department of Veterans Affairs Deferred or Confirmed Rating Decision of Edward R. Cole, dated January 16, 1991 . . . . . 21a
- Veterans Administration Statement of the Case in the Appeal of Edward R. Cole, dated March 12, 1991. . . . . 24a
- Excerpts from the Secretary of Veterans Affairs Brief in *Edward R. Cole v. Jesse Brown, Secretary of Veterans Affairs*, to the United States Court of Veterans Appeals. 29a

Page

– Order of the United States Court of Veterans Appeals No. 90-811, *Mary B. Locklear v. Edward J. Derwinski, Secretary of Veterans Affairs*, dated June 14, 1991 . . . . . 31a

– Order of the United States Court of Veterans Appeals No. 90-552, *Louis Hoffman v. Edward J. Derwinski, Secretary of Veterans Affairs*, dated June 20, 1991 . . . . . 33a

– Order of the United States Court of Veterans Appeals No. 91-1663, *Orval S. Brower v. Edward J. Derwinski, Secretary of Veterans Affairs*, dated March 27, 1992 . . . . . 36a

– Certificate of Death for Orval S. Brower, dated August 10, 1992 . . . . . 39a

– Order of the United States Court of Veterans Appeals No. 92-924, *Allen S. Sabol v. Anthony J. Principi, Acting Secretary of Veterans Affairs*, dated October 21, 1992. . . . . 45a

– Order of the United States Court of Veterans Appeals No. 91-1384, *William W. Hibbard v. Jesse Brown, Secretary of Veterans Affairs*, dated April 27, 1993. . . . . 46a

– Memorandum Decision of the United States Court of Veterans Appeals No. 91-338, *Walter S. Wood-Ward, Jr. v. Jesse Brown, Secretary of Veterans Affairs*, dated June 2, 1993 . . . . . 48a

– Order of the United States Court of Veterans Appeals No. 92-2, *Harald Naestvold v. Jesse Brown, Secretary of Veterans Affairs*, dated November 3, 1993. . . . . 52a

– Department of Veterans Affairs, Annual Report of the Secretary of Veterans Affairs – Fiscal Year 1993, pages 1, 95, 111 and 113 . . . . . 55a

– Statement of Charles L. Cragin, Chairman, Board of Veterans' Appeals, Department

Page

of Veterans Affairs, Before the Subcommittee On Compensation, Pension, and Insurance, Committee on Veterans' Affairs, House of Representatives, dated October 13, 1993, page 5 . . . . . 69a

– Statement of R.J. Vogel, Deputy Under Secretary for Benefits, Department of Veterans Affairs, Before the Subcommittee on Compensation, Pension, and Insurance, Committee on Veterans' Affairs, House of Representatives, dated February 23, 1994, page 4 . . . . . 71a

– Statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals, Before the Subcommittee on Compensation, Pension and Insurance, Committee on Veterans' Affairs, House of Representatives, dated February 23, 1994, page 1. . . . . 73a

– Report to the Committee on the Budget from the Committee on Veterans' Affairs, Submitted pursuant to Section 301 of the Congressional Budget Act of 1974 on the Budget Proposed for Fiscal Year 1995, page 22 . . . . . 76a

– Adjudication of Appeals By the Board of Veterans' Appeals, Hearing Before the Subcommittee on Compensation, Pension, and Insurance of the Committee on Veterans' Affairs, House of Representatives, dated May 6, 1993, page 33 . . . . . 79a

– Excerpts from Brief of Appellant Edward R. Cole to the United States Court of Veterans Appeals 83a

– Excerpt from Reply Brief of Appellant Edward R. Cole to the United States Court of Veterans Appeals 88a

TABLE OF AUTHORITIES

Page

Cases:

Abernathy v. Principi, 3 Vet. App. 461 (1992) 14

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). 9, 10

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). . . . . i, 9, 10, 11

Fanning v. Brown, 4 Vet. App. 225 (1993). 14

Fletcher v. Derwinski, 1 Vet. App. 394 (1991) 7, 12

Goodsell v. Brown, 5 Vet. App. 36 (1993) 15

Hamilton v. Derwinski, 2 Vet. App. 671 (1992) 12

Hayes (Paul) v. Brown, 5 Vet. App. 60 (1993) 13

Hayes (Mildred) v. Derwinski, 1 Vet. App. 186 (1991). 13

Hayes (Mildred) v. Derwinski, 4 Vet. App. 353 (1993). 13

Hayes (Paul) v. Derwinski, 1 Vet. App. 482 (1991) 13

Hensley v. Brown, 5 Vet. App. 155 (1993). 15

Hibbard v. Brown, No. 91-1384 (U.S. Vet. App. Apr. 27, 1993) 12

Hoffman v. Derwinski, No. 90-552 (U.S. Vet. App. June 20, 1991) 12

Hood v. Brown, 4 Vet. App. 301 (1993) 14, 15

Lendenmann v. Principi, 3 Vet. App. 345 (1992). 14

Locklear v. Derwinski, No. 90-811 (U.S. Vet. App. June 14, 1991) 12

Mitchell v. Forsyth, 472 U.S. 511 (1985). 11

Naestvold v. Brown, No. 92-2 (U.S. Vet. App. Nov. 3, 1993) 12

Odiorne v. Principi, 3 Vet. App. 456 (1992) 14

Sabol v. Derwinski, 2 Vet. App. 228 (1992) 13

Cases, continued: Page

Sabol v. Principi, No. 92-924 (U.S. Vet. App. Oct. 21, 1992). 13

Simon v. Derwinski, 2 Vet. App. 621 (1992) 14

Sullivan v. Finkelstein, 496 U.S. 617 (1990). 10

Varney v. Secretary of Health and Human Servs., 859 F.2d 1396 (9th Cir. 1988). 14

Woodward v. Brown, No. 91-338 (U.S. Vet. App. June 2, 1993) 12

Statutes and Rules:

38 C.F.R. §4.16 (1993) 5, 10

38 C.F.R. §4.16(a) (1993) 6

38 C.F.R. §4.127 (1993) 6

28 U.S.C. §1254(1) (1988). 2

38 U.S.C. §1710(a)(1)(A) (1988). 12

38 U.S.C. §7104(d)(1) (1988). 14

38 U.S.C. §7252(a) (1988) 2, 7, 8, 10, 11

38 U.S.C. §7261 (1988). 2

38 U.S.C. §7266(a) (1988) 3, 11

38 U.S.C. §7292(a), (c), (d) (1988) 3, 4, 5

Veterans Judicial Review & Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 15

Other Authorities:

Adjudication of Appeals by the Board of Veterans' Appeals: Hearing Before the Subcomm. on Compensation, Pension, and Insurance of the House Comm. on Veterans' Affairs, 103d Cong., 1st Sess. 33 (1993) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals) 13

Page

Other Authorities, continued:

Department of Veterans Affairs, Annual Report of the Secretary of Veterans Affairs – Fiscal Year 1993 (1994) 5, 6, 7, 8

Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs, 103d Cong., 1st Sess. (1993) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals) 7

Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs, 103d Cong., 2d Sess. 1 (1994) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals) 7, 13

Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs, 103d Cong., 2d Sess. (1994) (statement of R.J. Vogel, Deputy Under Secretary for Benefits, Department of Veterans Affairs) 12

Report to the House Comm. on the Budget from the Comm. on Veterans' Affairs, 103d Cong., 2d Sess. 22 (1994) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Edward R. Cole respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is unpublished but reported at 1994 U.S. App. Lexis 2389 (Fed. Cir. 1994) (3a-7a).

The order of the Court of Veterans Appeals (8a-9a) is unpublished but included in a table of orders at 5 Vet. App. 169 (1993) (No. 92-819). The decision of the Board of Veterans' Appeals is also unpublished (10a-17a).

JURISDICTION

The Federal Circuit entered judgment on February 4, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

1. 38 U.S.C. §7252 (1988) provides in part:

(a) The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

2. 38 U.S.C. §7261 (1988) provides in part:

(a) In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall –

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the

Board of Veterans' Appeals, or the Chairman of the Board found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.

3. 38 U.S.C. §7266 (1988) provides in part:

(a) In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title.

4. 38 U.S.C. §7292 (1988) provides in part:

(a) After a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation

(other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Veterans Appeals within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

. . . .

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

STATEMENT OF THE CASE

Mr. Cole served on active duty with the United States armed forces during the Korean conflict (25a). He is service connected for two disabilities, a gunshot wound in the right leg and post-traumatic stress disorder (PTSD) (20a). The Department of Veterans Affairs (VA) has rated Mr. Cole seventy percent disabled by these disabilities[1] (20a).

In August 1990, Mr. Cole filed a claim with the VA under 38 C.F.R. §4.16 (1993) seeking a total disability rating based on individual unemployability due to service-connected disabilities (19a). Mr. Cole has not worked since 1987 (19a). However, the VA concluded that his service-connected disabilities did not so incapacitate Mr. Cole as to prevent him from obtaining employment (27a). The claim was denied (27a).

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[1] The VA presently makes monthly disability compensation payments to more than 2.2 million veterans. *Department of Veterans Affairs, Annual Report of the Secretary of Veterans Affairs – Fiscal Year 1993* 95 (1994). (58a). The total of these payments exceeds $10 billion annually ($869 million monthly). *Id.* (58a).

An administrative appeal was taken to the Board of Veterans' Appeals (Board). The Board held that Mr. Cole had not established that his service-connected disabilities alone caused his unemployment (12a). Consequently, the Board affirmed the denial of a 100 percent disability rating (16a).[2]

Raising issues of law, Mr. Cole appealed the Board's decision to the Court of Veterans Appeals (CVA). Mr. Cole did not raise any objection to the record established before the Board or the Board's factual determinations. Instead, he urged that the Board: (1) misinterpreted 38 C.F.R. §4.16(a) (1993), requiring the Board to disregard the existence or degree of nonservice-connected disabilities when determining whether a veteran is individually unemployable; (2) misconstrued precedent requiring the VA to find that Mr. Cole's alleged personality disorder was service connected; and (3) ignored 38 C.F.R. §4.127 (1993), prohibiting the VA from apportioning the degree of a psychiatric impairment between a service-connected disability and a personality disorder (83a-87a).

The Secretary of Veterans Affairs (Secretary) raised a new issue in his brief. Disregarding Mr. Cole's legal issues, the Secretary urged that the Board had "failed to provide adequate reasons and bases for its determination to deny [Mr. Cole's] claim for a total rating due to individual unemployability." (29a). The Secretary asserted that "[t]he evidentiary basis for the [Board's] conclusion that [Mr. Cole's] personality disorder was at least equally responsible for his employment situation was

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[2] A large percentage of the approximately 26,400 cases decided by the Board in fiscal year 1993, *id.* at 111 (64a), involved veterans seeking increases in their already service-connected disability compensation benefits.

not clearly set forth in the decision." (29a). Confessing only to the error he alone raised, the Secretary asked the CVA to remand the case to allow the Board time to develop a further record on why Mr. Cole should be denied his 100 percent disability rating (29a-30a).

Mr. Cole objected to the proposed remand. In his reply brief, Mr. Cole argued that 38 U.S.C. §7252(a) expressly forbids the Secretary to seek review of a Board decision and denies the CVA jurisdiction to consider the Secretary's assignment of error (88a).

The CVA ignored Mr. Cole's argument. Refusing to discuss or even address Mr. Cole's jurisdictional argument, the CVA vacated the Board's decision and remanded the case back to the Board "for reasons set forth in the Secretary of Veterans Affairs' brief . . . ." (8a). The CVA did not address any of Mr. Cole's assignments of error (8a).

Facing years of delay as his case wound its way through the VA administrative labyrinth,[3] Mr. Cole

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[3] The Chairman of the Board of Veterans' Appeals has recently informed Congress that cases such as Mr. Cole's may require as many as five to six and one half years to decide, particularly if the Board further remands to the VA regional office for some purpose, such as an additional medical examination, in accordance with CVA precedent, e.g., *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991). *Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs*, 103d Cong., 2d Sess. 1 (1994) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals). (73a). The Chairman's previous forecasts of increasing time required for the Board to decide cases have proven accurate. *Compare Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs*, 103d Cong., 1st Sess. (1993) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals, predicting a response time of 441 days in

[footnote continued]

filed an appeal with the United States Court of Appeals for the Federal Circuit seeking review of the CVA's remand order. By remanding over Mr. Cole's objection, the CVA necessarily concluded that §7252(a) does not prohibit the CVA from remanding an appeal upon an assignment of error made solely by the Secretary. Mr. Cole challenged the CVA's interpretation of §7252(a).

The Federal Circuit did not reach the merits of the appeal. Rather, it found that the CVA's remand was not a final decision reviewable under 38 U.S.C. §7292(a). (4a). Additionally, the Federal Circuit held that a remand order could never satisfy the criteria for an immediate appeal under the collateral-order exception to the final judgment rule (7a). Mr. Cole's appeal was dismissed for lack of jurisdiction.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case for two reasons. First, the Federal Circuit's refusal to review the procedural and jurisdictional issue in this case, which is completely separate from the merits of this veteran's claim and will remain unreviewable unless heard interlocutory, conflicts with this Court's precedents allowing appeal of collateral orders. Second, the Federal Circuit's action in denying review in this case has sanctioned a jurisdictional and procedural practice by a new federal court, the Court of Veterans Appeals, so anomalous as to harm a large number of people and call for an exercise of this Court's supervision.

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fiscal year 1993) (70a) *with Department of Veterans Affairs, Annual Report of the Secretary of Veterans Affairs – Fiscal Year 1993* 113 (1994) (reporting an actual response time of 466 days for fiscal year 1993). (65a).

The Federal Circuit's dismissal of Mr. Cole's appeal misapplied the collateral-order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court should grant this petition to clarify application of the collateral-order doctrine and to provide guidance to the Federal Circuit, as well as the other circuit courts of appeals.

Under *Cohen*, an interlocutory order is appealable if it falls within:

> that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

337 U.S. at 546. Nearly thirty years after the *Cohen* decision was rendered, this Court articulated a three-element test describing an order appealable under the collateral-order exception. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). To satisfy that test, the order must:

> [(1)] conclusively determine the disputed question, [(2)] resolve an important issue completely separate from the merits of the action, and [(3)] be effectively unreviewable on appeal from a final judgment.

Id. at 468.

In considering whether jurisdiction is conferred by *Cohen/Coopers & Lybrand*, the Federal Circuit concluded that even if elements (1) and (3) were met, element (2) was not satisfied by the CVA's order. This conclusion, however, results from an erroneous interpretation of the *Coopers & Lybrand* test.

The Federal Circuit held that a remand order can never meet the *Coopers & Lybrand* requirement that it "resolve an important issue completely separate from the merits of the action . . . ." *Coopers & Lybrand*, 437 U.S. at 468. (7a). That holding is contrary to this Court's decision in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). In *Finkelstein*, this Court held a remand for rehearing appealable, even though other issues in the case remained to be resolved on remand. The only real difference between this case and *Finkelstein* is the identity of the party against whom the remand was entered. In *Finkelstein*, the remand order was entered against the Government. Here, it was entered against the private party.

This case further illustrates the error of the Federal Circuit's reasoning. Mr. Cole challenged the CVA's expansion of its jurisdiction in the face of an express statutory bar. That issue, i.e., whether Congress has denied the CVA the power to remand for the reason stated, 38 U.S.C. §7252(a), has no bearing whatsoever on the merits of Mr. Cole's claim, i.e., whether Mr. Cole is entitled to a 100 percent disability rating under 38 C.F.R. §4.16. This Court should resolve, for the Federal Circuit and all the courts of appeals, that remand orders are not per se exempt from review under the collateral-order doctrine.

Beyond the question of whether the issue presented is completely separate from the merits of the case, Mr. Cole's appeal otherwise satisfies the criteria for review under the collateral-order doctrine. The disputed question was whether Congress denied the CVA jurisdiction to remand under the circumstances of this case. The CVA's order conclusively determined that question when

it held that §7252(a) does not bar remand at the sole request of the Secretary.

The appropriateness of the CVA's remand is also "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand,* 437 U.S. at 468. Congress granted Mr. Cole the exclusive right to define the issues on appeal to the CVA. 38 U.S.C. §7252(a). That right is totally lost if the CVA's remand order stands. In immunity/double jeopardy cases, this Court characterized the legal right involved as "an *immunity from suit* rather than a mere defense to liability; . . . [which] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) (emphasis in original). That reasoning applies similarly here. Mr. Cole's exclusive right to define the issues on appeal includes the right not to be forced to expend resources on readjudication of issues he did not raise. Both rights will be irretrievably lost if the CVA remand order stands. If this Court reverses the Federal Circuit in this case, Mr. Cole will be entitled to immediate review of the CVA's remand order.

The CVA and the Secretary have constructed a procedural treadmill for veterans, such as Mr. Cole. Mr. Cole exercised his exclusive statutory right to review by the CVA under 38 U.S.C. §7266(a). The Secretary improperly intervened. Thus, the appellee Secretary assigned the error while the appellant Mr. Cole tried in vain to assign his errors. The appellee Secretary dictated the issue and the route the appeal took.

The net result of Mr. Cole's appeal is that none of the issues he raised have been resolved, or even addressed, by the CVA. The CVA has abandoned its mandatory jurisdiction. Mr. Cole, and all those similarly situated, are subjected to years of additional administrative pro-

ceedings, where, under CVA precedent, a CVA remand reopens the administrative record generally for de novo readjudication. *Fletcher v. Derwinski,* 1 Vet. App. 394, 397 (1991).

Mr. Cole is not alone on this treadmill. The CVA has remanded appeals back to the Board at the urging of the Secretary in countless cases. *E.g., Naestvold v. Brown,* No. 92-2 (U.S. Vet. App. Nov. 3, 1993) (unpublished order remanding for second time) (52a-54a); *Woodward v. Brown,* No. 91-338 (U.S. Vet. App. June 2, 1993) (mem. decision remanding over appellant's opposition) (48a-51a); *Hibbard v. Brown,* No. 91-1384 (U.S. Vet. App. Apr. 27, 1993) (order remanding) (46a-47a); *Hamilton v. Derwinski,* 2 Vet. App. 671, 673 (1992); *Hoffman v. Derwinski,* No. 90-552 (U.S. Vet. App. June 20, 1991) (order remanding over appellant's opposition) (33a-35a); *Locklear v. Derwinski,* No. 90-811 (U.S. Vet. App. June 14, 1991) (order remanding over appellant's opposition) (31a-32a). Such remands cost veterans valuable time and access to much needed benefits.[4]

Nearly four years have passed since Mr. Cole applied for benefits. His situation is not atypical, as delay permeates the adjudication process. The CVA's refusal to review Mr. Cole's legal issues compounds this delay.

Initially, completion of an original compensation claim at a VA regional office requires an estimated 226 days.[5]

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[4] Although this case involves disability compensation, other cases involve issues of service connection. Remands in these cases forestall access to VA medical treatment, *e.g.,* 38 U.S.C. §1710-(a)(1)(A) (1988), for which there is no remedy.

[5] This is a projection for the end of 1994. *Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs,* 103d Cong., 2d Sess. (1994) (statement of R.J. Vogel, Deputy Under Secretary for Benefits, Department of Veterans Affairs). (72a).

Should the veteran appeal, the estimated average time for the Board to respond is currently 725 days.[6] Unfortunately for the veteran, the situation will get worse as the Board Chairman's own estimates place the Board's response time between five and six and one-half years by 1995.[7] Upon review of the Board decision, a ruling by the CVA can easily require an additional six to twelve months.

Thus, one cycle of review from a regional office to the CVA presently averages three and one-half years. Cases then remanded by the CVA to the Board must be readjudicated, with over fifty percent of all Board dispositions resulting in remand for additional development at the regional level.[8] A lone remand by the CVA of Mr. Cole's claim could easily result in another one to three years of proceedings. Furthermore, the remand treadmill often results in more than one trip between the CVA and the Board for the unfortunate veteran.[9]

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[6] The Board projects this response time for fiscal year 1994. *Report to the House Comm. on the Budget from the Comm. on Veterans' Affairs*, 103d Cong., 2d Sess. 22 (1994). (78a).

[7] *Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs*, 103d Cong., 2d Sess. 1 (1994) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals). (73a).

[8] *Adjudication of Appeals by the Board of Veterans' Appeals: Hearing Before the Subcomm. on Compensation, Pension, and Insurance of the House Comm. on Veterans' Affairs*, 103d Cong., 1st Sess. 33 (1993) (statement of the Honorable Charles L. Cragin, Chairman, Board of Veterans' Appeals). (81a).

[9] *E.g., Hayes (Mildred) v. Derwinski*, 1 Vet. App. 186 (1991); *Hayes (Mildred) v. Derwinski*, 4 Vet. App. 353 (1993); *Hayes (Paul) v. Derwinski*, 1 Vet. App. 482 (1991); *Hayes (Paul) v. Brown*, 5 Vet. App. 60 (1993); *Sabol v. Derwinski*, 2 Vet. App. 228 (1992); *Sabol v. Principi*, No. 92-924 (U.S. Vet. App. Oct. 21, 1992) (order granting joint motion to dismiss based on settlement) (45a).

The Secretary's remand policy turns a cold shoulder to the veterans, many of whom are elderly or sick and in dire need of benefits. Veterans applying for compensation benefits, like Social Security claimants:

> generally suffer from crippling conditions that preclude them from earning a living wage; they often have no other source of income and can experience tremendous financial difficulties while awaiting the outcome of their appeals and proceedings on remand. . . .
>
> . . . .
>
> . . . Delaying the payment of benefits by requiring multiple administrative proceedings that are duplicative and unnecessary only serves to cause the applicant further damage – financial, medical, and emotional. Such damage can never be remedied.

Varney v. Secretary of Health and Human Servs., 859 F.2d 1396, 1398-99 (9th Cir. 1988). Put simply, back payment of entitlements does not make the veteran whole.

In most of the CVA's remands at the urging of the Secretary, as in this case, the Secretary has complained that the Board has not adequately stated the "reasons or bases" for its decision. However, before May 2, 1991, the CVA had directed the Board to clearly explain the reasons for its decisions, in accordance with 38 U.S.C. §7104(d)(1) (1988), in "no less than twenty published decisions and numerous memorandum decisions. . . ." *Simon v. Derwinski*, 2 Vet. App. 621, 622 (1992). The Board subsequently continued its failure to comply. *See, e.g., Lendenmann v. Principi*, 3 Vet. App. 345, 350 (1992); *Odiorne v. Principi*, 3 Vet. App. 456, 460 (1992); *Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992); *Fanning v. Brown*, 4 Vet. App. 225, 231 (1993); *Hood v. Brown*,

4 Vet. App. 301, 302 (1993); *Goodsell v. Brown*, 5 Vet. App. 36, 42 (1993); *Hensley v. Brown*, 5 Vet. App. 155, 161 (1993). The Board, knowing that a remand is readily available from the CVA for the Secretary's asking, has no incentive to explain itself fully the first time.

CVA remands clearly benefit the Secretary by furnishing an opportunity for him to avoid questions of law and secure after-the-fact support to buttress the Board's decision denying benefits. The present procedure effectively gives the Secretary two (and sometimes three or more) chances to support the decision. All the while the veteran goes without the benefits he seeks as his case bounces endlessly through the hallways of the Department of Veterans Affairs. By the Board's not substantiating a denial as required by law, the Secretary may then urge a remand to find sufficient evidence adverse to the claimant. The process bears no resemblance to the system Congress envisioned. Veterans Judicial Review & Benefits Improvement Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

CONCLUSION

Because the Federal Circuit misconstrued this Court's decision in *Coopers & Lybrand*, the procedural treadmill for veterans will needlessly continue. This petition should therefore be granted.

Respectfully submitted,

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(Counsel of Record)
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Counsel for Petitioner.

May 5, 1994

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:
February 4, 1994

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion

provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

/s/ FRANCIS X. GINDHART
Clerk

cc: RONALD L. SMITH
BRIAN S. SMITH

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-7084

EDWARD R. COLE,

Claimant-Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: February 4, 1994

Before NEWMAN, LOURIE, and SCHALL, *Circuit Judges*.

SCHALL, *Circuit Judge*.

DECISION

Edward R. Cole appeals from the April 13, 1993 order of the United States Court of Veterans Appeals (CVA) vacating, and remanding for readjudication, an April 3, 1992 decision by the Board of Veterans' Appeals (Board)

denying Mr. Cole's claim for a total disability rating. Because the CVA's order is not a final decision, we do not have jurisdiction under 38 U.S.C. §7292(a) (Supp. IV 1992) to entertain Mr. Cole's appeal. Consequently, we *dismiss* the appeal for lack of jurisdiction.

DISCUSSION

I.

Mr. Cole, a combat veteran of the Korean War, was granted by the Department of Veterans Affairs (Agency) a combined disability rating of 70 percent for two service-connected disabilities. Some time thereafter, Mr. Cole filed a claim with the Agency to have his disability rating increased to 100 percent (i.e., "total disability") based upon his alleged unemployability. Following a denial of his claim, Mr. Cole sought review before the Board. The Board affirmed the denial of the claim, concluding that Mr. Cole had failed to demonstrate that his unemployability was due to his service-connected disabilities.

Mr. Cole appealed the Board's decision to the CVA. By order dated April 13, 1993, the CVA vacated the Board's decision and remanded the case "for readjudication for reasons set forth in the Secretary of Veterans Affairs' brief and to permit [Mr. Cole's] counsel to present any issues deemed necessary for the proper readjudication of [Mr. Cole's] claim." In his brief before the CVA, the Secretary of Veterans Affairs (Secretary) asserted that a remand for adjudication was necessary because the record compiled by the Board was insufficient to permit appellate review. Specifically, the Secretary asserted that the Board had failed to set forth

in the record the evidentiary basis for its conclusion that Mr. Cole's non-service-connected disability contributed to his unemployability.

Upon appeal to this court, Mr. Cole asserts, *inter alia*, that the CVA's action of remanding the case for readjudication was improper because it was done at the behest of the Secretary rather than upon motion by Mr. Cole, or, presumably, by the CVA *sua sponte*. In support of his position, Mr. Cole argues that the Secretary's request for remand, and the CVA's grant thereof, violates 38 U.S.C. §7252(a) (Supp. IV 1992), which expressly prohibits the Secretary from seeking review of any decision by the Board.

II

The scope of this court's review in appeals from the CVA is limited by its statutory grant of jurisdiction, 38 U.S.C. §7292 (Supp. IV 1992). *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992). Specifically, this court may exercise jurisdiction to consider an appeal only "[a]fter a decision of the United States Court of Veterans Appeals is entered in a case." 38 U.S.C. §7292(a) (Supp. IV 1992). As we have explained, the word "decision" in 38 U.S.C. §7292 refers to a final decision. *Johnson v. Derwinski*, 949 F.2d 394, 395 (Fed. Cir. 1991), *cert. denied*, 112 S.Ct. 1683 (1992). Thus, the statute embodies the well-established principle, known as the "final judgment rule," which limits appellate jurisdiction to appeals from a decision or order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). Mr. Cole apparently concedes that the CVA's remand order is not

a final decision within the above definition. Nevertheless, he argues that this court has jurisdiction to entertain his appeal because it falls within an exception to the final judgment rule – namely, the "collateral order exception." We disagree.

Under the collateral order exception, an appellate court may exercise jurisdiction over a non-final decision if it falls within

> that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). This court has previously noted that *Cohen* requires three separate elements to be satisfied for an order to be deemed "collateral." Specifically, under the *Cohen* test the order must

> [(1)] conclusively determine the disputed question, [(2)] resolve an important issue completely separate from the merits of the action, and [(3)] be effectively unreviewable on appeal from a final judgment.

M.A. Mortenson Co. v. United States, 877 F.2d 50, 51 (Fed. Cir. 1989) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)). Even assuming, for the sake of argument, that the first and third elements of the *Cohen* test are satisfied, we cannot say that the CVA's order is completely separate from the merits of Mr. Cole's claim, so as to satisfy the second element of the *Cohen* test.

As the Supreme Court made clear in *Cohen*, an issue is completely separate from the merits of the action only

if "the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits . . . ." 337 U.S. at 546. As noted above, the CVA's remand order was entered for the express purpose of requiring the Board to supplement the evidentiary record to permit meaningful appellate review of the Board's decision on the merits. Therefore, it would seem axiomatic that the CVA's remand order will affect decision of the merits (because it relates directly to the evidence upon which the decision on the merits will be based). It is for this reason, among others, that this court has recognized, as a corollary to the final judgment rule, "that an order remanding a matter to an administrative agency for further findings and proceedings is not final." *Cabot Corp. v. United States,* 788 F.2d 1539, 1542 (Fed. Cir. 1986); *accord Badger-Powhatan v. United States,* 808 F.2d 823, (Fed. Cir. 1986); *Jeanette Sheet Glass Corp. v. United States,* 803 F.2d 1576 (Fed. Cir. 1986).

Accordingly, because the CVA's order vacating the Board's decision and remanding for readjudication by the Board cannot be characterized as completely separate from the merits of the action, the order is not appealable at this time.

UNITED STATES COURT OF VETERANS APPEALS

No. 92-819

EDWARD R. COLE, Appellant,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before NEBEKER, *Chief Judge.*

ORDER

On consideration of the parties' briefs and the record on appeal before this Court, it is

ORDERED that the April 3, 1992, Board of Veterans' Appeals (BVA) decision is vacated and this case is remanded for readjudication for reasons set forth in the Secretary of Veterans Affairs' brief and to permit appellant's counsel to present any issues deemed necessary for the proper readjudication of appellant's claim.

This action is without prejudice to the filing of a timely Notice of Appeal from any final adverse BVA decision upon remand. The Court does not retain jurisdiction.

DATED: APR 13 1993

BY THE COURT:
/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Chief Judge

Copies to:

Rick Surratt, Esq.
Disabled American Veterans
P.O. Box 1718
Bowie, MD 20717-0318

General Counsel (027)
Department of
Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

IN THE APPEAL OF
EDWARD R. COLE

C 16 860 262

[SEAL]

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

DOCKET NO. 91-36 544

DATE APR 03 1992

THE ISSUE

Entitlement to a total disability rating based on individual unemployability due to service-connnected disabilities.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Lorie Goode Ward, Associate Counsel

INTRODUCTION

The appellant had active military service from August 1950 to March 1952. This matter came before the Board of Veteran's Appeals (hereinafter Board) on appeal from a December 1990 rating decision of the Detroit, Michigan, regional office (hereinafter RO), which denied the appellant's claim of entitlement to a total disability rating based on individual unemployability due to service-connected disabilities. This was his initial claim for that benefit. The notice of disagreement was received in

February 1991. The statement of the case was issued in March 1991.

The appeal was received and docketed at the Board in July 1991. The appellant has been represented throughout his appeal by Disabled American Veterans. The case is now ready for appellate consideration.

CONTENTIONS OF APPELLANT ON APPEAL

The appellant contends that he suffers severe symptoms of his service-connected post-traumatic stress disorder on a daily basis. He maintains that the symptoms include feelings of rage, loss of control over his thoughts, nightmares, depression, and poor sleep. He asserts that he has been receiving intense outpatient treatment for his post-traumatic stress disorder, including medication, for the past several years. For these reasons, the appellant contends that his post-traumatic stress disorder, alone, has rendered him totally incapable of maintaining any kind of employment and that he maintains he is entitled to a total disability rating based on individual unemployability.

DECISION OF THE BOARD

For the reasons and bases hereinafter set forth, it is the decision of the Board that the preponderance of the evidence is against the appellant's claim of entitlement to a total disability rating based on individual unemployability due to service-connected disabilities.

FINDINGS OF FACT

1. The appellant has a high school education and an Associate's degree, has work experience as a pattern

maker and furniture store salesman, and last worked in 1987.

2. Service connection is currently in effect for post-traumatic stress disorder, evaluated as 70 percent disabling, and a gunshot wound of the right leg, evaluated as 10 percent disabling.

3. The appellant's service-connected psychiatric disability and gunshot wound of the right leg are not so incapacitating as to prevent him from engaging in all forms of substantially gainful employment, consistent with his education and occupational experience.

CONCLUSION OF LAW

Unemployability due to the appellant's service-connected disabilities has not been demonstrated. 38 U.S.C. §§1155, 5107 (1989) (formerly 38 U.S.C. §§355, 3007, recodified in 1991); 38 C.F.R. §§3.340, 3.341, Part 4, 4.16 (1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Initially, the Board notes that the provisions of 38 U.S.C. §5107(a) have been met, in that the appellant's claim is well-grounded and adequately developed.

Disability evaluations are determined accoring to criteria set forth in the Department of Veterans Affairs' (hereinafter VA) *Schedule for Rating Disabilities,* which is based on average impairment of earning capacity. 38 U.S.C. §1155; 38 C.F.R. Part 4. Separate Diagnostic Codes identify the various disabilities.

Review of the evidence concerning the appellant's entitlement to a total disability rating based on individual

unemployability due to service-connected disabilities may be briefly summarized. The appellant's separation examination, dated in March 1952, indicated he had a scar on the right leg due to a gunshot wound. In August 1952 the appellant filed a claim for compensation due to his gunshot wound of the right leg. A VA examination, dated in December 1952, revealed that he was having trouble with his right leg as a result of the gunshot wound, but that there was no bone involvement, and he had a normal knee, ankle, and foot. He was subsequently given a 10 percent evaluation for his gunshot wound to the right leg disability. In February 1988, the appellant filed a claim for post-traumatic stress disorder, and submitted a private medical examination of April 1966 which showed a diagnosis for depressive reaction. He filed a claim for individual unemployability due to service-connected disabilities in August 1990.

Total disability ratings for compensation may be assigned where the schedular rating for the service-connected disability or disabilities is less than 100 percent when it is found that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age. 38 C.F.R. §§3.340, 3.341, 4.16.

Evidence considered by the Board in evaluating the appellant's claim includes a VA psychiatric report of December 1987, VA outpatient treatment records and hospitalization records from 1988 to 1989, a VA medical examination of November 1989, the appellant's personal hearing transcript before the RO in June 1990, which concerned a matter not at issue in the current appeal, a VA hospitalization record, dated in November 1990, and a VA medical statement dated in February 1991.

In a December 1987 VA psychiatric report, the appellant was shown to have chronic post-traumatic stress disorder.

The report reveals he was depressed, had impaired functioning with social relations and use of leisure time, and had good insight.

In a personal hearing before the RO in June 1990, the appellant stated that his basic stressor for his post-traumatic stress disorder was his memory of having shot a North Korean Company Commander through the head as part of a sniper assignment in service. Because of this incident, he said he had been "dead" inside since 1987.

A VA medical examination in November 1989 showed that the appellant had post-traumatic stress disorder, but that he was correctly oriented in time and place, had a clear sensorium, logical narrative, and no evidence of delusional thinking or hallucinogenic experiences. The examination further revealed that he had good social adjustment and impaired vocational adjustment, due to his emphysema.

A VA hospitalization record, dated in November 1990, indicates that the appellant had service-connected post-traumatic stress disorder, as well as nonservice-connected obsessive compulsive personality disorder, with moderate psychosocial stressors and moderate functioning. A mental status examination at that time revealed no evidence of loose associations, flight of ideas, auditory or visual hallucinations, ideas of reference, or frank psychosis. The appellant had no cognitive impairments, and, while harsh at first, was later more endearing. He did appear well groomed and neatly dressed, showing slight agitation when asked questions, and showing signs of depression. Additionally, it was noted that the appellant had a perfectionism that manifested itself by his work history as a pattern maker.

In a February 1991 medical statement, VA psychologists indicated that they had treated the appellant for post-traumatic stress disorder and obsessive compulsive disorder in November 1990 (noted above), and his difficulties relating to both disorders were found to be of sufficient magnitude to prevent him from obtaining satisfactory employment.

VA outpatient treatment records and hospitalization records from 1988 to 1990 are negative for any complaint or finding or residual complications of the appellant's service-connected gunshot wound of the right leg.

The fact that the appellant's service-connected post-traumatic stress disorder causes significant industrial impairment has been recognized, and is reflected by the disability evaluation assigned for it. The Board notes, however, that his nonservice-connected obsessive compulsive personality disorder appears to be giving him at least as much trouble as his post-traumatic stress disorder. Personality disorders are not diseases within the meaning of applicable legislation providing compensation benefits. 38 C.F.R. 3.303(c). Although the appellant claims that he is unable to work, the objective clinical documentation of record does not establish that he is effectively precluded from performing *all* forms of substantially gainful employment, solely as the result of his service-connected disabilities. Rather, the medical evidence reveals that he is at least equally limited by his nonservice-connected psychiatric disorder. In summary, while the Board is sympathetic to the problems the appellant is experiencing due to his service-connected disabilities, we have concluded that the evidence, when considered in its entirety, does not demonstrate that he is unemployable as the result of his service-connected post-trau-

matic stress disorder and gunshot wound of the right leg.

ORDER

A total disability evaluation based on individual unemployability due to service-connected disabilities is denied.

[SEAL]

BOARD OF VETERANS' APPEALS
WASHINGTON, D.C. 20420

* /s/ Harry M. McAllister

HARRY M. McALLISTER, M.D.

/s/ M. Sabulsky

M. SABULSKY

*38 U.S.C. §7102(a)(2)(A) (1991) permits a Board of Veterans' Appeals Section, upon direction of the Chairman of the Board, to proceed with the transaction of business without awaiting assignment of an additional Member to the Section when the Section is composed of fewer than three Members due to absence of a Member, vacancy on the Board or inability of the Member assigned to the Section to serve on the panel. The Chairman has directed that the Section proceed with the transaction of business, including the issuance of decisions, without awaiting the assignment of a third Member.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. §7266 (formerly 38 U.S.C. §4066), a decision of the Board of Veterans' Appeals granting less than the com-

plete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988 (see sec. 402 of the Veterans' Judicial Review Act (Pub. L. 100-687)). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

(NOTE: The section numbers of title 38, United States Code, were changed in 1991. The new section numbers are given above, followed, in parentheses, by "formerly 38 U.S.C." and the old section numbers in effect prior to the 1991 revisions.)

Department of Veterans Affairs – RATING DECISION

1. REGIONAL OFFICE NUMBER	2. TYPE OF RATING
329	DISABILITY

3. ORIGINAL DISABILITY RATING	4. VETERAN'S FILE NUMBER
NO	C 16 860 262

5. VETERAN'S INITIALS AND SURNAME	6. COPY TO	7. VETERAN'S SOCIAL SECURITY NUMBER
E. R. COLE		372 30 5558

8. DATE OF CLAIM	9. DATE OF THIS RATING
10/15/90	

10. DATE OF BIRTH	11. DATE OF DEATH
5/14/32	

12. ACTIVE DUTY *(Mo., day, yr.)*				13. ADDITIONAL SERVICE CODE
EOD	RAD	EOD	RAD	

14. COMBAT STATUS	15. DATE OF LAST EXAMINATION
1	11/27/89

16. DATE OF FUTURE PHYSICAL EXAMINATION *(Mo./yr.)*	17. EMPLOYABLE *(Compensation only)*
11/92	YES

18. COMPETENT	19. SPECIAL PROVISION CODE
YES	

20. NUMBER OF ADDITIONAL DIAGNOSTICS	21. NUMBER OF ADDITIONAL S/C DIAGNOSTICS

22. SPECIAL MONTHLY COMPENSATION

A. STATUS	B. BASIC SMC	C. HOSPITAL SMC	D. LOSS OF USE	E. ANAT LOSS	F. OTHER LOSS
CURRENT					
FUTURE					

23. NARRATIVE

J: Claim for increase.

I: Individual unemployability.

E: VA Form 21-8940 dated August 6, 1990.

VA Form 21-4192 dated November 1, 1990.

F: The veteran has a established service connection for post-traumatic stress disorder assigned a 70% evaluation and for residuals of a gunshot wound to the right leg assigned a 10% evaluation. Veteran indicates that he last worked in sales in December 1987. Prior statement indicates the veteran has no set hours and could come and go as he chose and indicated the stated reason for termination from employment was PTSD. The veteran indicates he has made no attempt to seek other employment.

D: Veteran's service-connected nervous condition has been previously determined not in and of iteself to produce a total social and vocational impairment. Further, considering all service-connected disabilities, it is not demonstrated these preclude all forms of substantially gainful employment. Entitlement to a

	total rating due to individual unemployability is not demonstrated.
9411	1. SC (KC INC) POST-TRAUMATIC STRESS DISORDER 70% from 2/1/89
5311	WOUND, GSW, THROUGH AND THROUGH M.G. XII, LEG, RIGHT 10% from 2/16/52
COMB SC:	70% from 2/1/89
	18B. I.U. not found

24. MEDICAL RATING SPECIALIST	25. RATING SPECIALIST
/s/ A. Blain III, M.D. A. BLAIN III, M.D.	/s/ R. D. Willey R. D. WILLEY

26. RATING SPECIALIST	27. PA	28. RB NUMBER
/s/ W. J. Sharer W. J. SHARER	DAV	B1/ee

DEFERRED OR CONFIRMED RATING DECISION

1. TYPE OF CLAIM
X DISABILITY
☐ DEATH
☐ ACCRUED

2. FILE NUMBER
16860262

3. INITIALS AND SURNAME OF VETERAN
E. R. COLE

4. DATE OF DEATH

5. DATE OF LAST EXAMINATION
HR 11/2 - 11/19/90

6. DATE OF THIS RATING
1/16/91

PART I – DEFERRED RATING DECISION
(Rating deferred pending receipt of data indicated below.)

7. REASONS FOR DEFERRAL *(Check appropriate boxes)*

☐ EXAMINATION REPORT ☐ HOSPITAL REPORT ☐ FIELD EXAMINATION REPORT

☐ SUPPLEMENTAL SERVICE RECORDS ☐ EVIDENCE FROM VETERAN OR OTHERS ☐ OTHER *(Specify)*

8. EXPLANATION FOR ITEMS CHECKED

D: 70% eval confirmed, total social and vocational impairment not known

---

PART II – CONFIRMED RATING DECISION

9. CLAIM REVIEWED ON THE FOLLOWING EVIDENCE:

J: [Illegible] Summary rec'd 12/27/90

I: Eval S/C nervous and

E: [Illegible] AA HR 11/2 – 11/19/90

F: Vet requested shock treatments but was vague about symptoms he wanted to improve. He spoke of

his stresses episode in service. Vet behavior and personality style and daily behavior patterns were related to a obsessive compulsive personality Disorder. Vet reported progress.

10. EVIDENCE WAS RECEIVED SUBSEQUENT TO RATING ACTION DATED:

12/6/90

This evidence does not warrant change in service-connected status or evaluation of any disability or contain any new and material evidence relevant to the question at issue which was not on file when the previous decision was made. Such decision is therefore CONFIRMED.

11. DECISION ON EXAMINATION REPORT

☐ VA FORM 21-2507 ATTACHED ☒ FUTURE EXAMINATION AS SCHEDULED ☐ NO EXAMINATION

12. FUTURE DATE CONTROLS

☐ REFER TO INPUT ACTIVITY

ACTION	MONTH	YEAR	REASON

TRANS. CODE

2 0

01 - FUTURE PHYS.
02 - INDIVID. UNEMP. REVIEW
03 - HELPLESS CHILD REVIEW
04 - NSC TB VAR 1342 REVIEW

ACTION CODES

1 – ESTABLISH
2 – CANCEL

13. CLAIMANT REPRESENTED BY:

☐ AL ☐ VFW ☒ DAV ☐ ARC ☐ AMVETS ☐ OTHER *(Specify)*

14. RATING BOARD NO.

[Illegible]

15. STATION NO.

[Illegible]

16. RATING SPECIALIST
(Medical)
[Illegible]

17. RATING SPECIALIST
(Legal-Occupational)
[Illegible]

18. RATING SPECIALIST
(Legal-Occupational)
[Illegible]

VETERANS ADMINISTRATION

Regional Office
477 Michigan Avenue
Detroit, MI 48226

329/212
C 16 860 262
COLE, Edward R.

STATEMENT OF THE CASE

IN THE APPEAL
OF

MR. EDWARD R. COLE

FROM THE DECISION OF THE
VETERANS ADMINISTRATION

NOTICE TO APPELLANT:

This is not a decision on the appeal you have initiated. It is a "Statement of the Case" which the law requires us to furnish to help you in completing your appeal.

Please read the forwarding letter carefully, as well as the instructions on the enclosed appeal form. These explain your appeal rights and tell you what you must do to complete your appeal.

A copy of this "Statement of the Case" has been furnished your representative:

Disabled American Veterans.

ISSUE:

Entitlement to a total rating due to individual unemployability.

2. SUMMARY OF EVIDENCE AND ADJUDICATION ACTIONS:

Service:	August 5, 1950, to March 15, 1952; honorable.
October 15, 1990:	The veteran submitted a claim for a total rating due to individual unemployability. The veteran indicated that he last worked in sales in December 1987. He indicated that he had no set hours and could come and go as he chose and indicated the stated reason for his termination from employment was post-traumatic stress disorder. The veteran indicated he made no attempt to seek other employment.
December 6, 1990:	Rating Decision made this date denied entitlement to a total rating due to individual unemployability.
January 16, 1991:	The veteran was informed of this decision by letter.
January 31, 1991:	Notice of Disagreement received.
March 7, 1991:	Statement was associated with the claims folder from treating psychologist, VA Medical Center, Ann Arbor. Indicated that the veteran's multiple diagnosed emotional conditions were contributing to his ability to obtain satisfactory employment.

Rating Decision made this date confirmed prior denial of entitlement to a total rating due to individual unemployability. This Statement of the Case serves as first notice of this decision.

3. PERTINENT LAWS: VA REGULATIONS; RATING SCHEDULE PROVISIONS:

The following is an explanation of abbreviations used in legal citations: "38 U.S.C. 310" indicates Title 38 of the United States Code, Section 310. "38 CFR 4.17" means Title 38 of the Code of Federal Regulations, Part 4, Section 17.

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service connected disability (disabilities). (38 CFR 4.16)

Unemployability as a result of service connected disabilities requires that if there is only one such disability, this disability shall be ratable at 60% or more and that, if there are two or more disabilities, there shall be at least one disability ratable at 40% or more, and sufficient additional disability to bring the combined rating to 70% or more. (38 CFR 4.16)

For the above purpose of one 60% disability, or one 40% disability in combination, the following will be considered as one disability: (1) disabilities of one or both upper extremeties, or one or both lower extremities, including the bilateral factor, if applicable; (2) disabilities

resulting from common etiology or a single accident, or (3) disabilities affecting a single body system, e.g., digestive, respiratory, cardiovascular, or (4) multiple injuries incurred in action. (38 CFR 4.16)

DECISION:

Entitlement to a total rating due to individual unemployability is not demonstrated.

REASONS FOR DECISION:

A claim for individual unemployability must be based on a finding that the service-connected disabilities alone preclude the veteran from securing and maintaining gainful employment. Age and other nonservice-connected related issues are not considered as a factor in the determination process. It should be recognized that the fact that the veteran cannot perform a specific type of employment, or even work that he had previously been trained to do does not necessarily require conclusion that he is incapable of all forms of substantially gainful employment. In this case, the evidence of record does not demonstrate that the veteran's service-connected disabilities considered alone render the veteran unable to secure and/or maintain gainful employment.

SUBMITTED BY: /s/ W.J. Sharer Date: 3/12/91
W.J. SHARER
Rating Specialist

APPROVED BY: /s/ D. Wagenschultz Date: 3-12-91
D. WAGENSCHUTZ
Chairman

WJS/611/mwa
DICT: 3/7/91
TIME: 4:14 p.m.
TYPED: 3/11/91

Excerpts from the Secretary of Veterans Affairs Brief in *Edward R. Cole v. Jesse Brown, Secretary of Veterans Affairs* to the United States Court of Veteran Appeals

the mental disorder shall be assigned a one hundred percent (100%) evaluation. 38 C.F.R. §4.16(c).

SUMMARY OF ARGUMENT

Remand is appropriate in the instant case because the BVA failed to provide adequate reasons and bases for its determination to deny Appellant's claim for a total rating due to individual unemployability. The evidentiary basis for the BVA's conclusion that Appellant's personality disorder was at least equally responsible for his employment situation was not clearly set forth in the decision. On remand, additional development of the evidence on this issue may be advisable.

In addition, remand is appropriate in this case in that the BVA's decision was based upon an inadequate record. The evidence indicated that Appellant's nonservice-connected emphysema may have had an impact upon his vocational adjustment. Although the BVA recognized this fact, the BVA failed to discuss or analyze this issue in any depth. The record also indicates that the effect of Appellant's emphysema upon his claim has never been fully developed for appellate review.

ARGUMENT

This case should be remanded because the BVA failed to provide adequate reasons and bases for its decision to deny Appellant's claim of a total rat-

ing for individual unemployability, and such decision was based upon an inadequate record.

Remand is merited in the instant case due to the fact that the BVA, in its April 1992 decision, failed to develop in appropriate detail the reasons or bases upon which its decision was grounded as required by *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The need for specificity is particularly acute when, as here, conclusions are of a scientific or medical nature. *See Sammarco v. Derwinski*, 1 Vet.App. 111 (1991); *Murphy v. Derwinski*, 1 Vet.App. 78 (1990). Furthermore, remand is appropriate where the BVA has based its Decision upon an inadequate record. *Littke v. Derwinski*, 1 Vet.App. 90 (1990).

In the instant case, while the BVA decision contains some discussion concerning the conditions at issue, and does cite pertinent evidence generated, the BVA should, on remand, state with specificity and particularity on what evidence it bases its decision, and it should account for evidence which it finds to be persuasive or unpersuasive. *Gilbert*, 1 Vet.App. at 57. Therefore, it is the Secretary's position that the BVA decision does not set forth sufficient reasons and bases so as to render this case, in its current posture, susceptible to appellate review.

In its April 1992 Decision, the BVA evaluated the evidence of record that included numerous medical records ranging over a period of many years. Most of these records evidenced treatment for Appellant's PTSD. (R. 8-9, 64-83, 88-115, 117-124, 354-355, 360).

* * *

Note: Pursuant to 38 U.S.C. §4067(d) (1988), this decision will become the decision of the Court thirty days from the date hereof.

UNITED STATES COURT OF VETERANS APPEALS

No. 90-811

MARY B. LOCKLEAR, Appellant,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before NEBEKER, *Chief Judge.*

ORDER

The Secretary of Veterans Affairs has filed a motion to remand this case to the Board of Veterans' Appeals (BVA) for further procedural development. Appellant has filed a response in opposition to the Secretary's motion for remand and a motion for summary reversal. On consideration of the foregoing, it is

ORDERED that the Secretary's motion for remand is granted and the BVA decision dated May 10, 1990, is vacated. *See Swan v. Derwinski,* U.S. Vet. App. No. 89-75 (Order dated Apr. 12, 1991). The case is remanded with directions that the BVA address the issue of reduction of appellant's total disability rating from 100 per-

cent to 70 percent in light of 38 C.F.R. §§3.343, 3.344, 4.10 (1990). It is further

ORDERED that the BVA, in its decision, specifically address appellant's medical condition at the time of her original rating in 1975 with her condition at the present time. *See Gilbert v. Derwinski*, U.S. Vet. App. No. 89-53 (Oct. 12, 1990). It is further

ORDERED that appellant's motion for summary reversal is denied.

DATED: JUN 14 1991

BY THE COURT:

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Chief Judge

Copies to:

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UNITED STATES COURT OF VETERANS APPEALS

No. 90-552

LOUIS HOFFMANN, Appellant,

v. VA Filed No. 25 584 847

EDWARD J. DERWINSKI,
Secretary of Veterans Affairs, Appellee.

Before NEBEKER, *Chief Judge.*

ORDER

NEBEKER, *Chief Judge*: In its March 2, 1990, decision, the Board of Veterans' Appeals (Board) concluded that entitlement to a total disability rating for post-traumatic stress disorder, currently evaluated as 70-percent disabling, was not demonstrated by the evidence presented.

In order for appellant to qualify for a total disability rating for post-traumatic stress disorder, appellant's condition must satisfy the schedular criteria for 100-percent disability under 38 C.F.R. §4.132 (1990), diagnostic code 9411: Post-Traumatic Stress Disorder. If appellant's condition does not meet those criteria, he may in the alternative seek a total disability evaluation under 38 C.F.R. §4.16(c)(1990). That regulation provides that in order to qualify for a total disability evaluation, a veteran must be assigned a 70-percent evaluation for his mental disorder and that disorder must preclude him from securing and following a substantially gainful occupation. The

issues of employability and vocational rehabilitation have not been addressed, as they should have, by the Regional Office or the Board. Upon consideration of the record, the appellant's brief the appellee's motion for remand and stay of further proceedings, and the appellant's opposition thereto, it is

ORDERED that the decision of the Board is vacated and the matter is remanded to the Board. The Board is directed to readjudicate the claim and determine the appellant's actual industrial impairment from post-traumatic stress disorder after appropriate factual inquiry into appellant's employability. See 38 U.S.C. §2211-(a)(1) (1988), requiring the Secretary to decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. The Board must explain the impact and relevance of any evaluations to other medical evidence in the claims folder and state the reasons or bases for its decision. *See Gilbert v. Derwinski*, U.S. Vet. App. No. 89-53 (Oct. 12, 1990). It is further

ORDERED that the Court retains jurisdiction over the appeal. The Secretary shall file with the Clerk and serve upon the appellant a copy of the Board's decision on remand. Within 14 days thereafter, the appellant shall notify the Clerk whether he desires to seek further review by the Court.

DATED: June 20, 1991 BY THE COURT:

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Chief Judge

Copies to:

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CORRECTED COPY

UNITED STATES COURT OF VETERANS APPEALS

No. 91-1663

ORVAL S. BROWER, Appellant,

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before NEBEKER, *Chief Judge.*

ORDER

On December 27, 1991, appellant filed a motion for summary reversal of the July 15, 1991, decision of the Board of Veterans' Appeals (Board or BVA) because the Board refused to follow precedent established by this Court in *Fugere v. Derwinski,* 1 Vet.App. 103 (1990), *appeal docketed,* No. 91-7058 (Fed. Cir. April 4, 1991). On December 30, 1991, the Secretary filed a motion for suspension of appellate proceedings, which motion was granted. On January 13, 1992, the Secretary of Veterans Affairs (Secretary) filed a response in opposition to appellant's motion for summary reversal, and a motion for an order vacating the Board decision and remanding the case.

In *Tobler v. Derwinski,* 2 Vet.App. 8 (1991), *appeal docketed,* No. 92-7020 (Fed. Cir. Feb. 20, 1992), the

Court held that it has the authority and the responsibility to provide the definitive interpretation of relevant legislation and that the Board is bound to consider and, if applicable, follow decisions of the Court from the date they are issued, unless and until they are overturned by this Court en banc, the United States Court of Appeals for the Federal Circuit, or the Supreme Court of the United States. The Court held that the refusal to consider the applicability of controlling precedent set forth by decision of the Court constitutes error as a matter of law. *Id.*, slip op. at 11.

On consideration of the foregoing, it is

ORDERED that the July 3, 1991, decision of the BVA is vacated and the case is remanded for readjudication.

DATED: MAR 27 1992

BY THE COURT:

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Chief Judge

Copies to:

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pam

MEMORANDUM

As a matter of information, I note that the Secretary is not correct in stating that the term *reverse* "generally

connotes Court action directing that the appellant prevail on the merits of the claim at issue." Appellee's Motion to Vacate at 2. Whatever fine distinctions may exist between a reversal and a judgment or order vacating a decision, it is necessary to look to further language that describes to the parties the relief ordered, e.g., remanded for readjudication, or remanded with directions to grant a specific form of relief. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Riha v. ITT*, 533 F.2d 1053 (8th Cir. 1976); *Keller v. Hall*, 111 F.2d 129 (9th Cir. 1940). The Court would not remand for Board readjudication and at the same time direct a particular result. If an appellant were entitled to prevail, the Court's judgment would order the particular relief to be granted and would not direct Board readjudication. Also, I fail to understand the Secretary's assertion that if the Board's decision is reversed, "there would be no remaining adjudication in which the Board would need to apply judicial precedent". The Board would have the appeal to it once again and in readjudicating the claim, the Board would have the precedent of the Court to guide it. Of course, the Board could see fit to hold this case in abeyance pending final decision in *Fugere*.

COUNTY OF RIVERSIDE

RIVERSIDE, CALIFORNIA

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

DECEDENT PERSONAL DATA

1A. NAME OF DECEDENT – First *(Given)*	1B. MIDDLE	1C LAST (Family)
Orval	Sheridan	Brower

2A. DATE OF DEATH – Mo. Day Yr.	2B. HOUR	3. SEX
August 2, 1992	1525	M

4. RACE	5. HISPANIC – Specify
Caucasian	☐ Yes ☒ No

6. DATE OF BIRTH – Mo. Day. Yr.	7. AGE IN YEARS
March 14, 1895	97

IF UNDER 1 YEAR
MONTHS – DAYS

IF UNDER 24 HOURS
HOURS – MINUTES

8. STATE OF BIRTH	9. CITIZEN OF WHAT COUNTRY	10A. FULL NAME OF FATHER
KS	USA	Martin I. Brower

10B. STATE OF BIRTH	11A. FULL MAIDEN NAME OF MOTHER	11B. STATE OF BIRTH
KS	Myrtle E. Clore	MO

12. MILITARY SERVICE:	13. SOCIAL SECURITY NO.
1917 to 19 19 ☐ None	541-32-8769

14. MARITAL STATUS
Married

15. NAME OF SURVIVING SPOUSE (If Wife, Enter Maiden Name)
Mary Riegel

16A. USUAL OCCUPATION
Owner

16B. USUAL KIND OF BUSINESS OR INDUSTRY
Restaurant

16C. USUAL EMPLOYER
Self

16D. YEARS IN OCCUPATION
21

17. EDUCATION – YEARS COMPLETED
15

USUAL RESIDENCE

18A. RESIDENCE – STREET AND NUMBER OR LOCATION
2220 El Rancho

18B. CITY
Hemet

18C. ZIP CODE
92545

18D. COUNTY
Riverside

18E. NUMBER OF YEARS IN THIS COUNTY
27

18F. STATE OR FOREIGN COUNTRY
CA

20. NAME, RELATIONSHIP, MAILING ADDRESS AND ZIP CODE OF INFORMANT
Mary Brower – Wife
2220 El Rancho
Hemet, CA 92545

PLACE OF DEATH

19A. PLACE OF DEATH
Hemet Valley Medical Center

19B. IF HOSPITAL SPECIFY ONE: IP, ER/OP, DOA
ER/OP

19C. COUNTY
Riverside

19D. STREET ADDRESS – STREET AND NUMBER OR LOCATION
1117 E. Devonshire

19E. CITY
Hemet

CAUSE OF DEATH

21. DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR A, B, AND C)

IMMEDIATE CAUSE (A)

Cardiopulmonary Arrest

TIME INTERVAL BETWEEN ONSET AND DEATH – MIN

DUE TO (B)

Cerebrovascular Accident

TIME INTERVAL BETWEEN ONSET AND DEATH – Days

DUE TO (C)

Arteriosclerotic Heart Disease

TIME INTERVAL BETWEEN ONSET AND DEATH – YRS

22. WAS DEATH REPORTED TO CORONER?

Referral Number

☒ Yes 92M1704 ☐ No

23. WAS BIOPSY PERFORMED?	24A. WAS AUTOPSY PERFORMED?	24B. WAS IT USED IN DETERMINING CAUSE OF DEATH?
☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☐ No

25. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 21

None

26. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEM 21 or 25? IF YES, LIST TYPE OF OPERATION AND DATE.

No.

PHYSICIAN'S CERTIFICATION

I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.

27A. DECEDENT ATTENDED SINCE MONTH, DAY, YEAR

1-10-90

DECEDENT LAST SEEN ALIVE MONTH, DAY, YEAR

7-30-92

27B. SIGNATURE AND DEGREE OR TITLE OF CERTIFIER

/s/

27C. CERTIFIER'S LICENSE NUMBER

[Illegible]

27D. DATE SIGNED

8-3-92

27E. TYPE ATTENDING PHYSICIAN'S NAME AND ADDRESS

Jahanguir Haj Aliloo, MD 850 E. Latham 'M', Hemet, CA 92543

CORONER'S USE ONLY

I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.

28A. SIGNATURE AND TITLE OF CORONER OR DEPUTY CORONER

28B. DATE SIGNED

29. MANNER OF DEATH – specify one: natural, accident, suicide, homicide, pending investigation or could not be determined

30A. PLACE OF INJURY

30B. INJURY AT WORK

☐ Yes ☐ No.

30C. DATE OF INJURY
MONTH, DAY, YEAR

31. HOUR

32.LOCATION (STREET AND NUMBER OR LOCATION AND CITY)

33. DESCRIBE HOW INJURY OCCURRED (EVENTS WHICH RESULTED IN INJURY)

FUNERAL DIRECTOR AND LOCAL REGISTRAR

34A. DISPOSITION(S)
CR/BU

34B. PLACE OF FINAL DISPOSITION – NAME AND ADDRESS
Riverside National Cemetery
Riverside, CA

34C. DATE
MO, DAY, YEAR
Aug. 5, 1992

35A. SIGNATURE OF EMBALMER
Not Embalmed

35B. LICENSE NUMBER
None

36A. NAME OF FUNERAL DIRECTOR (OR PERSON ACTING AS SUCH)
Miller-Jones Mortuary & Crematory

36B. LICENSE NO.
1286

37. SIGNATURE OF LOCAL REGISTRAR
/s/ Dale B. Sparks, Md. OB

38. REGISTRATION DATE
AUG 04 1992

STATE REGISTRAR

A. B. C. D. E. F. CENSUS TRACT

337577

CERTIFIED COPY OF VITAL RECORDS
DATE ISSUED
Aug 10 1992

/s/ Dale B. Sparks, Md.
Acting Director

[SEAL] [SEAL]

UNITED STATES COURT OF VETERANS APPEALS

No. 92-924

ALLEN S. SABOL, Appellant,

v.

ANTHONY J. PRINCIPI,
Acting Secretary of Veterans Affairs, Appellee.

ORDER

The parties have moved jointly to dismiss this appeal on terms agreed upon by the parties. See Rule 42. It is

ORDERED that the motion is granted and this appeal is dismissed.

DATED: OCT 21 1992

FOR THE COURT:

/s/ Robert F. Comeau
ROBERT F. COMEAU
Clerk of the Court

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UNITED STATES COURT OF VETERANS APPEALS

No. 91-1384

WILLIAM W. HIBBARD, Appellant,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before IVERS, *Associate Judge.*

ORDER

This matter is before the Court on appeal from an May 2, 1991, decision of the Board of Veteran's Appeals (BVA or Board) denying benefits putsuant to the provisions of 38 U.S.C.A. §1151 for paraplegia, paralyzed left diaphragm, and decubitus ulcers alleged to have developed as a result of medical treatment by the Department of Veterans Affairs. Both parties have filed briefs and the appellant has filed a reply brief. The Court has jurisdiction of the case under 38 U.S.C.A. §7252(a) (West 1991).

In his brief and in his reply brief, appellant seeks reversal of the BVA decision, citing *Gardner v. Derwinski,* 1 Vet.App. 584 (1991), *appeal docketed,* No. 92-7025 (Fed. Cir. 1992) and pointing out that, in denying his claim, both the agency of original jurisdiction and BVA cited and relied upon 38 C.F.R. §3.358(c)(3), the specific regulatory provision invalidated in *Gardner.* The Secretary in his brief, argues that this case must

be remanded for BVA application of this Court's decision in *Gardner.*

Appellant's argument that the BVA based its denial upon 38 C.F.R. §3.358(c)(3) is correct. However, the invalidation of that provision of the regulations in *Gardner* is the basis of that decision and that decision is precedential. The application of precedential decisions of this Court is a task which must be performed "in the first instance . . . by the Board." *Tobler v. Derwinski,* 2 Vet.App. 8, 10 (1991).

Upon consideration of the briefs of the parties and the record on appeal, it is

ORDERED that the BVA decision of May 2, 1991, is VACATED and the matter is REMANDED to the BVA for readjudication in compliance with this Court's decisions.

DATED: APR 27 1993

BY THE COURT:

/s/ Donald L. Ivers
DONALD L. IVERS
Associate Judge

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UNITED STATES COURT OF VETERANS APPEALS

No. 91-338

WALTER S. WOODWARD, JR., Appellant,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before FARLEY, *Associate Judge.*

MEMORANDUM DECISION

Note: This single-judge disposition is of no precedential value. See Bethea v. Derwinski, 2 Vet.App. 252, 254 (1992).

FARLEY, *Associate Judge*: This is an appeal from a November 19, 1990, decision of the Board of Veterans' Appeals (BVA or Board) which denied entitlement to (1) service connection for post-traumatic stress disorder (PTSD); (2) service connection for hearing loss with tinnitus; (3) an earlier effective date for a grant of service connection for residuals of a shell fragment wound of the right leg; and (4) an increased rating for residuals of a shell fragment wound of the right leg with retained foreign bodies and a draining ulcer, currently evaluated as 10% disabling. (Appellant has not raised before this Court the issues of entitlement to service connection for a hearing loss with tinnitus or entitlement to an earlier effective date for service connection for the residuals of a shell fragment wound of the right

leg.) A timely appeal to this Court followed. The Court has jurisdiction pursuant to 38 U.S.C.A. §7252(a) (West 1991). On December 7, 1992, appellant, through his service representative, filed a brief in support of his claim. On January 15, 1993, the Secretary of Veterans Affairs (Secretary) filed a motion for remand and for a stay of further proceedings pending a ruling on this motion. On February 1, 1993, appellant filed a reply in opposition to the Secretary's motion for remand.

With respect to appellant's claim for service connection for PTSD, the Secretary first notes that during a Veterans' Administration (now Department of Veterans Affairs) compensation examination conducted in October 1988, the examiner recommended that appellant be admitted to the psychiatric ward for further evaluation and observation to clarify his diagnosis, but that such an evaluation was never conducted. Secretary's Br. at 2; R. at 58. Additionally, the Secretary contends that although the record indicates that appellant sought or received mental health treatment on numerous occasions since his separation from service, the reports of these periods of treatment are not contained in the record. Secretary's Br. at 2-3; R. at 12, 51; S.R. at 17-19. For these reasons, the Secretary requests that the issue be remanded to the Board for further development and adjudication, to include an attempt to obtain all medical records referenced in appellant's file, as well as a psychiatric evaluation to determine the appropriate diagnosis for appellant's psychiatric disorder. Secretary's Br. at 3 (citing *EF v. Derwinski,* 1 Vet.App. 324, 326 (1991); *Green v. Derwinski,* 1 Vet.App. 121, 124 (1991); *Littke v. Derwinski,* 1 Vet.App. 90, 92 (1990)).

With respect to appellant's claim for entitlement to an increased rating for the residuals of a shell fragment

wound of the right leg, currently evaluated as 10% disabling, the Secretary states that it is not clear from the BVA decision specifically how the Board determined appellant's level of disability since the record contains so few service medical records (SMRs) and because those SMRs which were available to the Board provide little guidance with respect to rating appellant's leg injury. Secretary's Br. at 3. The Secretary concedes that it is unclear from the Board's decision whether the Board even considered the SMRs of record. *Id.* The Secretary also states that it is unclear from the BVA decision whether the Board considered all of the relevant regulatory provisions in rating appellant's leg injury. Secretary's Br. at 4 (citing to 38 C.F.R. § § 4.55, 4.56 (1992)).

It is not the function of this Court to determine in the first instance the degree of disability or to assign a rating; "rather, it is the function of this Court to decide whether such factual determinations made by the BVA in a particular case constitued clear error." *Gilbert v. Derwinski,* 1 Vet.App. 49, 53 (1990). Therefore, even if we were to concur with the arguments raised in appellant's opposition to the Secretary's motion, the final result would be the same as that presently sought by the Secretary: a Court order remanding the case to the BVA for further development and adjudication of appellant's claims.

Upon consideration of the record and the filings of the parties, the Court holds that a remand is warranted. There is no need for the Court to specifically order the Board to address each of the deficiencies asserted by the Secretary. "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the BVA will reexamine the evidence of record, seek any other evidence the Board feels is neces-

sary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski,* 1 Vet.App. 394, 397 (1991). Moreover, if the circumstances warrant, the BVA is authorized and obligated to remand the claim to the Regional Office for further development. *See* 38 C.F.R. §19.182(a) (1992); *Littke,* 1 Vet.App. at 92-93. On remand, the Board is directed to provide an adequate statement of its reasons or bases for its decision under 38 U.S.C.A. §7104(d)(1) (West 1991) and to apply the benefit of the doubt doctrine under 38 U.S.C.A. §5107(b) (West 1991). *See Gilbert,* 1 Vet.App. 49. Further, the Board is directed to provide an analysis of the credibility or probative value of the evidence submitted by or on behalf of the veteran in support of his claims and to cite to independent medical authority to support its ultimate conclusions. *See Moore v. Derwinski,* 1 Vet.App. 401, 404 (1991); *Jones v. Derwinwki,* 1 Vet.App. 210, 217 (1991); *Colvin v. Derwinski,* 1 Vet.App. 171, 175 (1991). Summary disposition is appropriate. *See Frankel v. Derwinski,* 1 Vet.App. 23 (1990).

Accordingly, the BVA's November 19, 1990, decision is VACATED with respect to the issues of entitlement to service connection for PTSD and entitlement to an increased rating for residuals of a shell fragment wound of the right leg, and the matters are REMANDED for further development and readjudication.

DATED: JUN 2-1993

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Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 92-2

HARALD NAESTVOLD, Appellant,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, Appellee.

Before NEBEKER, *Chief Judge.*

ORDER

Appellant, Harald Naestvold, served in the Armed Forces from January 1977 to December 1980. In August 1981, the Regional Office (RO) denied his original claim for tinnitus due to acoustic trauma. R. at 5. On appeal, the Board of Veterans' Appeals (BVA) reversed the RO and granted service connection for bilateral tinnitus. R. at 50.

Consequently, in December 1982, the RO evaluated the tinnitus "[a]s being due to acoustic trauma in view of VA examiner's opinion that hearing loss is sensorineural in nature, and in view of history of acoustic trauma." R. at 55. However, in July 1983, the RO reversed its conclusion, evaluating the tinnitus as "secondary to otitis media." (Otisis media is "inflammation of the middle ear marked by pain, fever, dizziness and abnormalities of hearing." WEBSTER'S MEDICAL DESK DICTIONARY, 503 (1986)).

In 1989, appellant sought to reopen his claim and submitted a statement reporting exposure to severe acoustic trauma during service. R. at 67. The RO denied the claim on the merits. R. at 68. The BVA affirmed the RO decision. On appeal, this Court vacated that decision and remanded with directions to readjudicate. *Naestvold v. Derwinski,* U.S. Vet. App. No. 90-907 (June 14, 1991) (order). Appellant now appeals the December 3, 1991, BVA decision which denied entitlement to an increased rating for tinnitus.

Appellant, through counsel, opposes the Secretary's motion in an apparent but curious attempt to induce the Court to decide an argument as to the classification of causes of tinnitus on constitutional grounds. A counsel's institutional interest in securing the resolution of a general cause cannot be permitted to override an individual client's interest. Moreover, as the Court noted in *Bucklinger v. Brown,* ___ Vet.App. ___ , No. 92-273 (Aug. 24, 1993), the principle of judicial restraint counsels against reaching and resolving constitutional questions unnecessarily. Because there is incomplete medical evidence regarding the etiology of appellant's tinnitus, it is hereby

ORDERED that the Secretary's motion to remand for examination and reevaluation of the etiology of appellant's tinnitus is granted.

The Court does not reach appellant's constitutional question.

DATED: NOV 3-1993

BY THE COURT:

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Chief Judge

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DEPARTMENT OF VETERANS AFFAIRS

ANNUAL REPORT OF THE SECRETARY OF VETERANS AFFAIRS

Fiscal Year 1993

"Putting Veterans First"

THE VETERAN

Summary

Beginning with our Nation's struggle for freedom two centuries ago, approximately 41 million men and women have served their country during wartime periods. Most (about 85 percent) served in one or more of the four major conflicts of the 20th century, with World War II veterans alone representing more than 40 percent of all American war participants. As of July 1, 1993, an estimated 26.8 million veterans were living in the United States and the Commonwealth of Puerto Rico; 20.7 million of these veterans served during at least one wartime period. (See Table 1.)

Number of Veterans and Periods of Service

The estimate of the veteran population living in the United States and Puerto Rico stands at 26,789,000 as of July 1, 1993. This figure represents an overall decline

in the veteran population (192,000 less than the total as of July 1, 1992) as the result of a higher number of veteran deaths (490,000) than separations from the Armed Forces (298,000).

For the first time, the number of Vietnam era veterans exceeds the number of World War II veterans. As of July 1, 1993, there were an estimated 8,287,000 living Vietnam era veterans, representing 31 percent of the total veteran population. Veterans who served during World War II are now the second largest component of the veteran population; numbering 8,150,000, they constituted 30 percent of the overall veteran count. World War II veterans accounted for 71 percent of all veteran deaths (349,000) between July 1, 1992, and July 2, 1993.

Two other major conflicts and the Persian Gulf War contributed to the total count of United States wartime veterans. Living Korean conflict participants totaled 4,692,000 (18 percent of all veterans), Persian Gulf War veterans numbered 1,027,000 (approximately 4 percent of all veterans), and World War I veterans numbered 25,000 (less than one-tenth of 1 percent) as of July 1, 1993.

Approximately 6.1 million veterans (23 percent) served only during peacetime. Almost equal numbers of these peacetime veterans served only between the Korean Conflict and the Vietnam era (2.9 million) or only between May 7, 1975, and August 1, 1990, during the post-Vietnam peacetime era (3.1 million).

Age of Veterans

As of July 1, 1993, one-half of all living veterans were older than 56.3 years of age (the median age) and one-half were younger. Veterans under 45 years of age con-

stituted 26 percent of the total, while those aged 45 to 64 represented 43 percent. Veterans 65 years old and older accounted for 31 percent of the overall veteran count. The 75 to 79 and 85 to 89 year old age groups showed the greatest relative increase (15 and 18 percent respectively) in number over the last year, reflecting the aging of World War II veterans. The 40 to 44 year old age group showed the greatest relative decline (13 percent) in number, reflecting the similar aging of the Vietnam era veterans. (See Chart 1.)

Approximately 29 percent of all civilian males 18 years old and older were veterans on July 1, 1993. This percentage varied by age, reflecting the degree of our Nation's involvement in each of the major armed conflicts of this century. For example, of those civilian males aged 70 to 74 years, 76 percent were veterans, clear evidence of the extent of our participation in World War II; among civilian males aged 45 to 49 years, 44 percent were veterans, reflecting America's participation in the Vietnam War. (See Chart 2.)

1

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Table 51 – Disability: Degree of Impairment and Type of Major Disability by Period of Service – September 30, 1993

Degree of Impairment	*Total*		*Psychiatric and Neurological Diseases*		*General Medical and Surgical Conditions (1)*	
	Number	*Monthly Value*	*Number*	*Monthly Value*	*Number*	*Monthly Value*
Total – all periods	2,197,635	$869,374,900	424,736	$310,132,600	1,772,899	$559,242,300
Zero percent (statutory award)	19,771	1,328,500	—	—	19,771	1,328,500
10 percent	877,141	74,930,800	114,517	9,743,400	762,624	65,187,400
20 percent	356,706	57,968,500	23,783	3,859,800	332,923	54,108,700
30 percent	304,137	83,534,900	71,207	19,362,200	232,930	64,172,700
40 percent	180,049	71,062,000	26,347	10,321,700	153,702	60,740,300
50 percent	107,108	59,722,600	39,759	21,909,800	67,349	37,812,800
60 percent	105,672	99,387,900	18,818	15,844,900	86,854	83,543,000
70 percent	60,854	69,855,300	23,201	25,500,900	37,653	44,354,500
80 percent	35,882	49,220,600	10,303	14,501,400	25,579	34,719,200
90 percent	15,481	24,027,700	4,398	7,040,200	11,083	16,987,500
100 percent	134,834	278,336,000.	92,403	182,048,400	42,431	96,287,600

(continued)

Table 51 – Disability: Degree of Impairment and Type of Major Disability by Period of Service – September 30, 1993

Degree of Impairment	*Total*		*Psychiatric and Neurological Diseases*		*General Medical and Surgical Conditions (1)*	
	Number	*Monthly Value*	*Number*	*Monthly Value*	*Number*	*Monthly Value*
World War 1(2)	1,385	644,400	260	190,000	1,125	454,400
Zero percent (statutory award)	17	1,200	—	—	17	1,200
10 percent	300	30,000	28	2,900	272	27,100
20 percent	369	71,400	50	10,200	319	61,200
30 percent	208	57,200	34	9,700	174	47,500
40 percent	113	44,500	16	6,400	97	38,200
50 percent	89	48,800	39	21,900	50	26,800
60 percent	87	82,800	6	5,200	81	77,600
70 percent	48	53,300	22	20,700	26	32,700
80 percent	37	46,700	5	5,600	32	41,100
90 percent	11	15,000	1	1,000	10	14,000
100 percent	106	193,500	59	106,400	47	87,100

(continued)

Table 51 – Disability: Degree of Impairment and Type of Major Disability by Period of Service – September 30, 1993

Degree of Impairment	*Total*		*Psychiatric and Neurological Diseases*		*General Medical and Surgical Conditions (1)*	
	Number	*Monthly Value*	*Number*	*Monthly Value*	*Number*	*Monthly Value*
World War II	768,618	291,131,100	172,409	101,782.900	596,209	189,348,200
Zero percent (statutory award)	10,496	704,700	—	—	10,496	704,700
10 percent	302,970	25,825,600	57,406	4,883,700	245,564	20,941,900
20 percent	112,040	18,190,600	9,089	1,473,700	102,951	16,716,800
30 percent	114,880	30,733,000	32,097	8,533,400	82,783	22,199,600
40 percent	64,844	24,909,800	10,813	4,123,800	54,031	20,786,000
50 percent	41,750	22,827,300	15,439	8,360,300	26,311	14,467,100
60 percent	42,229	40,883,500	7,651	6,413,700	34,578	34,469,800
70 percent	22,576	26,430,600	8,262	9,691,000	14,314	16,739,600
80 percent	14,068	18,734,500	3,793	5,250,100	10,275	13,484,400
90 percent	5,418	8,164,000	1,300	1,991,600	4,118	6,172,400
100 percent	37,347	73,727,400	26,559	51,061,500	10,788	22,665,900

(continued)

Table 51 – Disability: Degree of Impairment and Type of Major Disability by Period of Service – September 30, 1993

Degree of Impairment	*Total*		*Psychiatric and Neurological Diseases*		*General Medical and Surgical Conditions (1)*	
	Number	*Monthly Value*	*Number*	*Monthly Value*	*Number*	*Monthly Value*
Korean Conflict	198,492	90,554,900	35,688	33,421,500	162,804	57,133,400
Zero percent (statutory award)	5,792	388,600	—	—	5,792	388,600
10 percent	68,903	5,889,500	7,364	626,500	61,539	5,263,000
20 percent	29,620	4,813,800	1,513	245,600	28,107	4,568,200
30 percent	27,731	7,444,400	5,029	1,344,700	22,702	6,099,700
40 percent	16,985	6,598,400	2,058	795,900	14,927	5,802,500
50 percent	9,983	5,502,700	3,119	1,703,200	6,864	3,799,600
60 percent	11,833	11,919,800	1,898	1,700,500	9,935	10,219,300
70 percent	6,655	8,024,300	2,230	2,579,300	4,425	5,445,000
80 percent	3,952	5,528,000	1,094	1,573,200	2,858	3,954,800
90 percent	1,692	2,606,000	443	700,500	1,249	1,905,500
100 percent	15,346	31,839,400	10,940	22,152,100	4,406	9,687,300

See footnotes at end of table

Personnel, Labor Relations, Ethics and Miscellaneous Issues

OGC has represented the Department in cases attempting to resolve several grievances concerning the Department's alleged failure to comply with the *Fair Labor Standards Act.* The Act requires that employers pay time and a half to employees covered by its provisions for overtime. Federal employees have been covered under the Act since 1978. VA classified employees in the Veterans Benefits Administration as covered or exempt from the Act in 1978 using guidance from the Office of Personnel Management. Employee unions have challenged those classifications. Based on recent litigation, VA has recognized that the OPM guidance may have been erroneous, adversely affecting employees in VBA's regional offices and perhaps other offices as well. The Department has made several substantial settlement offers to major unions representing its employees to resolve questions regarding their current classifications under the Act and back pay for any erroneous classifications. Discussions to resolve these issues are continuing and VA hopes to resolve these issues and related grievances quickly and amicably.

OGC has expanded its role in providing legal services to the Veterans Canteen Service (VCS). Recent developments in Federal labor relations case law and aggressive union representation has required that VCS expend greater effort in managing its labor relations activities. VCS has recently been subjected to demands for collective bargaining and related alleged unfair labor practices over pay for non-General Schedule or prevailing rate employees and canteen pricing and service policies in VA facilities in Lexington, KY, and Newington, CT.

These pending and recently decided cases raised issues which had not previously been raised in VCS' 47-year history. OGC has taken a proactive role in providing legal advice to allow VCS management to identify weaknesses in its labor relations program and address those weaknesses before they adversely affect either VDS' or VA's labor relations program. OGC continues to work with VCS to ensure that its managers are fully aware of the labor relations laws that apply to its activities.

The role of OGC as the ethics office for the Department continued to intensify. In response to new requirements, attorneys provided useful training on employee standards of conduct and other ethics rules for some 7,000 officials. The office also began administering a new confidential financial disclosure program affecting mid-level managers throughout VA. The ethics staff gave close support to VHA in its effort to tighten the procedures for scarce medical contracting. The increased activity helped fulfill the Department's pledge to improve the disclosure program, upgrade ethics training, and enhance communications on ethics issues within VA.

Board of Veterans' Appeals

The Board of Veterans' Appeals (BVA or the Board) was established under 38 U.S.C., ch. 71, to render the final decision for the secretary on all appeals for entitlement to benefits administered by the Department of Veterans Affairs. In addition, BVA is responsible for deciding matters concerning fees charged by attorneys and agents for representation before the Department under 38 U.S.C. §5904. The Board's mission is to decide cases on a timely and consistent basis and to issue quality decisions in compliance with the requirements of the law,

including the precedential decisions of the United States Court of Veterans Appeals (the Court). The Board is administered and supervised by its Chairman, who was appointed by the President of the United States and confirmed by the Senate and is directly responsible to the Secretary of Veterans Affairs. The Vice Chairman, Deputy Vice Chairman, and 64 other members of the Board are appointed by the Secretary for terms of office. Each appointment is approved by the President. The Board also includes staff counsel, medical advisors, and administrative personnel, who enable BVA to conduct hearings and dispose of appeals in a timely manner.

During FY 1993, BVA produced a total of 26,400 decisions. This represents a significant reduction from both FY 1991, when 45,308 appellate decisions were produced, and from FY 1992, when 33,483 decisions were promulgated. The progressive reduction is directly attributable to the Board's implementation of the precedent decisions of the Court concerning the adjudication of claims for veterans' benefits. In particular, the Court's decisions concerning the VA's "duty to assist" the claimant under 38 U.S.C. §5907, and the necessity of applying each Court decision from the date of its issuance to all other cases in the process of adjudicative or appellate review, have led to a marked increase in the percentage of cases returned to VA regional offices (VAROs). In FY 1991, 29.7 percent of the cases were remanded to VAROs. In FY 1992, 50.5 percent of the cases were remanded for further action. The remand rate decreased to 44 percent in FY 1993, in part because the Board's workload included a large number of cases that were returned to BVA for final adjudication following completion by the originating agency of the development requested by the Board in a previous remand decision.

The accompanying chart breaks down the disposition of the Board's decisions by category of appeal. (See chart 1.)

111

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and increased medical research by the Board and its staff; increased number of formal hearings before the Board, as well as increased time required for travel to hearings at VAROs; and requirements of more formal Rules of Practice. The average BVA response time has increased from 139 days in FY 1991 to 240 days in FY 1992 and to 466 days in FY 1993. Response time is defined as the number of days it would take BVA to render decisions on all pending appeals at the processing rate of the immediately preceding one-year time frame.

In response to the increase in workload, the Board hired 57 new attorneys in FY 1993. An improved, formalized training program for new staff counsel was established. This includes medical lectures by the Board's staff of physician-advisors as well as intensive training for new staff counsel. Also in the past year, Board personnel, who had been dispersed in several locations within the District of Columbia, were consolidated into one building to improve communications and case movement logistics.

The Board's ongoing automation project is intended to increase the efficiency of its operations and thereby offset, to the extent practicable, the adverse effects of judicial review on BVA productivity and timeliness. In FY 1993, over 200 personal computers were installed for use by the Board's professional and administrative services. Office automation was introduced into 15 additional Board sections for a total of 19 automated Board

sections. Automation of the remaining 2 Board sections was completed in October 1993. Other technological innovations include the production of a CD-ROM containing the full text of all Board decisions issued in 1992 together with an index of those decisions. This archival resource, which will facilitate research involving prior BVA decisions, was issued in August 1993. In addition, the final phase of the project to replace BVA's Veterans Appeals Control and Locator System (VACOLS) began in FY 1993. The new system, to be completed in FY 1994, will operate in the Nationwide Office Automation for the Department of Veterans Affairs (NOAVA) computer environment and greatly improve the efficiency of case tracking and information management. In FY 1993, agreement was reached to provide VBA with access to VACOLS in order to facilitate the sharing of information.

Under 38 U.S.C. §7101(c)(3), the Secretary is required to report, in terms of full-time employee equivalents (FTE), the number of temporary Board members designated under 38 U.S.C. §7101(c)(1) and the number of acting Board members designated under 38 U.S.C. §7102(a)(2)(A)(iii) during the preceding year. During FY 1993, 4 attorneys served as acting Board members from time to time, for a total of .64 FTE. All four of these attorneys have been appointed by the Secretary to become members of the Board. Their appointments are awaiting the approval of the President. In addition, 2 physicians served as acting Board members from time to time during the fiscal year, for a total of .51 FTE.

Thus, the total FTE of acting Board members in FY 1993 was 1.2 FTE. No temporary Board members were designated during FY 1993. The Board continues to

utilize a system of written quarterly designations of acting Board members by the Chairman to ensure continued adherence to the statutory requirements regarding the use of acting Board members.

Board of Contract Appeals

The VA Board of Contract Appeals (BCA or Board) is an independent staff office that was established on March 1, 1979, pursuant to the *Contract Disputes Act of 1978,* to consider disputes between contracting officers and Federal contractors in connection with VA construction, supply, and service contracts.

The bulk of the BCA's caseload concerns disputes arising from the construction or renovation of VA hospitals, nursing homes, and outpatient clinics. Additional activity arises from contracts for the procurement of drugs, computers, and other necessary supplies and services for VA. The Board's jurisdiction was expanded, in 1985, to include applications for attorney fees and expenses under the *Equal Access to Justice Act.*

Proceedings before the Board are adversarial in nature and on the record with witnesses under oath and subject to cross examination. The hearings are conducted under rules and procedures comparable to those of the United States Court of Federal Claims and to those utilized by Federal District Courts in non-jury, civil cases. BCA issues written decisions consisting of detailed findings of fact and conclusions of law, which are published and available from a number of commercial sources. More informal and rapid procedures (utilized in about 14 percent of the appeals filed) are available to contractors with small claims, many of whom appear personally and without attorneys before the Board. Hearings are held

in Washington, DC, or at various locations around the United States where the disputed contracts were performed. Board decisions are final but may be appealed by either the contractor or VA to the United States Court of Appeals for the Federal Circuit.

Board members also serve as triers of disputed facts in Department debarment/suspension proceedings. Finally, pursuant to the *Administrative Dispute Resolution (ADR) Act*, the Chairman of the Board has been designated by the Secretary as the senior Department official to promote ADR techniques within VA. During the past year, ADR was employed in several large cases pending before the Board.

113

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STATEMENT OF

CHARLES L. CRAGIN

CHAIRMAN, BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, AND INSURANCE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

OCTOBER 13, 1993

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to urge prompt consideration of the Department of Veterans Affairs' proposed "Veterans' Appeals Improvement Act of 1993," and to express VA's general support for H.R. 2341, the "Veterans' Compensation Rates Amendments of 1993," and our views on H.R. 1796, a bill to increased the special pension payable to recipients of the Congressional Medal of Honor.

The Veterans' Compensation Rates Amendments of 1993

VA strongly supports a cost-of-living adjustment (COLA) in compensation and dependency and indemnity compensation (DIC) rates.

The Veterans' Appeals Improvement Act of 1993

The improvements proposed in the "Veterans' Appeals Improvement Act of 1993" are urgently needed to reverse the trends of decreasing productivity and increasing response time of the Board of Veterans' Appeals. The growing demand for personal hearings, changes made by the Veterans' Judicial Review Act of 1988, and the evolving body of case law generated by the United States Court of Veterans Appeals (CVA or Court) have all contributed to the increased delays appellants are experiencing. The number of BVA decisions issued declined from 45,308 in FY 1991 to 33,483 in FY 1992, and is believed to have dropped further to 27,600 in FY 1993. (The number of appeals received by the BVA has also decreased, but only from 43,903 in FY 1991 to 38,229 in FY 1992, and is expected to rise to 39,000 in FY 1993.) More dramatic has been the increase in response time, the projected number of days it would take the BVA to decide all currently pending appeals, based on the average number of decisions rendered per day over the preceding year. Response time increased from 139 days in FY 1991 to 240 days in FY 1992, and is expected to soar to 441 days in FY 1993. Current BVA procedures must be revised to permit the Board to improve its productivity and timeliness. We estimate that allowing individual Board members to sign decisions (as proposed in the bill), alone, would have raised the output of decisions in fiscal year 1994

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STATEMENT OF

R.J. VOGEL

DEPUTY UNDER SECRETARY FOR BENEFITS

DEPARTMENT OF VETERANS AFFAIRS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION, AND INSURANCE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

FEBRUARY 23, 1994

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the President's 1995 budget request for the Veterans Benefits Administration's compensation and pension programs.

For FY 1995 we are requesting $17.97 billion for compensation and pension programs. This represents a $447 million increase over the estimated 1994 budget of $17.53 billion and a more significant increase over the 1993 budget of $17.2 billion. We are requesting nearly $14.5 billion for compensation programs in 1995 and $3.3 billion for pension programs. These appropriations, which take into account a projected 3 percent cost-of-living adjustment in compensation

* * *

Actual work completed has declined from 3.4 million claims in 1993 to an estimated 3.3 million in 1994 and 2.8 million in 1995. Most of the decline, perhaps as much as 75 to 80 percent, can be attributed to a decline in cases arising under OBRA 1990. Nonetheless, we anticipate no corresponding improvements in claims processing timeliness. To take one example, at the end of FY 1992, it took 164 days to complete an original compensation claim. By the end of 1993, that figure had risen to 189 days. On the basis of current FTEE projections, we estimate that at the end of 1994, it will take 226 days to complete an original compensation claim, rising to 235 days by the end of 1995.

A number of different factors have contributed to produce this situation. Recent downsizing of the military, coupled with our own outreach efforts and those of veterans' service organizations, has produced both an increased number of original compensation claims and a greater number of issues per claim that must be addressed. For example, in 1990 we received 100,000 original compensation claims. Most of them had, on the average, 1 to 3 issues to be resolved. In 1993, we received

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STATEMENT OF THE HONORABLE
CHARLES L. CRAGIN
CHAIRMAN, BOARD OF VETERANS' APPEALS

BEFORE THE

SUBCOMMITTEE ON COMPENSATION, PENSION
AND INSURANCE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

February 23, 1994

Thank you, Mr. Chairman. It is a pleasure to be with you and the other members of the Committee this morning to offer the Administration's views on the budgetary needs of the Board of Veterans' Appeals.

We share the concerns of this Committee with regard to the need for some kind of relief from the excessive average response times required in connection with an appeal to the Board of Veterans' Appeals. As recently as fiscal year 1991, it took the Board, on the average, less than five months – 139 days – to reach a final decision on an appeal. Because of constantly increasing procedural requirements and changes in the law (as interpreted by the Court of Veterans Appeals), the Board saw its average response time climb to 466 days at the end of FY 1993. If statistics from the first quarter of FY 1994 are reliable (and first-quarter statistics have been reliable), we are looking at an average response time of 1,843 days – *5 years* – by the end of this September and 2,397 days – *6½ years* – by the end of FY 1995.

As you correctly pointed out at the Subcommittee's hearing last November, Mr. Chairman, this is justice delayed – and that is justice denied.

I want to discuss with you and other members of the Subcommittee how we got here and – more importantly – measures we are taking at the Board to increase productivity and timeliness.

As a preliminary matter, however, I want to thank the Secretary and the Deputy Secretary for their help in the budgetary process. These are times of fiscal restraint, which is felt by every part of the Department. But I am pleased to report that Secretary Brown and Deputy Secretary Gober – both of whom have the experience of representing veterans before VA – fought hard to keep average employment at the Board at its fiscal year 1994 level. The veterans community is fortunate to have such advocates leading VA.

I will not mince words, Mr. Chairman. We are where we are because of the Veterans' Judicial Review Act. That landmark legislation, which created the Court of Veterans Appeals, has increased the time a claimant must wait for a final decision. There is no doubt that the Court is an adversarial system grafted on to one which was designed to function in a nonadversarial manner. The result is that the mere availability of judicial review has made the administrative adjudication process more formalistic, rigid, complex, and inherently more time-consuming. The attached chart provides in graphic form an illustration of just how complex and convoluted the process of appellate adjudication at the Board has become in the era of judicial review.

I am not saying that there have not been major benefits from judicial review. There have. It has helped in

establishing a more systematic approach to benefits claims adjudication. It has provided a forum to veterans for dispute resolution outside the Department when they may feel that VA has not treated them fairly.

These benefits, however, have not been achieved without costs, particularly in increased formality and complexity of the adjudication process. I noted in my 1992 *Annual Report to Congress* that no decision of the Court, with the exception of *Bethea v.*

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103d Congress
2d Session

HOUSE COMMITTEE PRINT NO. 3

REPORT

TO THE

COMMITTEE ON THE BUDGET

FROM THE

COMMITTEE ON VETERANS' AFFAIRS

SUBMITTED PURSUANT TO SECTION 301 OF THE CONGRESSIONAL BUDGET ACT OF 1974

ON THE

BUDGET PROPOSED FOR FISCAL YEAR 1995

[SEAL]

MARCH 3, 1994. – Printed for the use of the Committee on Veterans' Affairs of the House of Representatives

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1994

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veterans and lenders and a corresponding rise in the incidence of foreclosure and property management costs and lost savings opportunities. The Committee supports the Administration's request to maintain loan guaranty staffing at 2,042 in fiscal year 1995.

F. Insurance Programs

The Administration has also requested the appropriations committee to enact a legislative change which would provide for the payment of administrative expenses of the National Service Life, United States Government Life, and Veterans Special Life Insurance programs out of funds not needed to pay claims or for policy reserves (excess funds), beginning in fiscal year 1995. Historically, excess funds have been returned to policy holders in the form of annual dividends. It is estimated that the average dividend payments to veterans would be reduced by $10 under this proposal. The cost-savings associated with the operation of these programs will be $29.4 million in fiscal year 1995 and, over a five-year period, the total cost-savings would be $136.3 million. *Should this legislation not be enacted, VA estimates that an additional reduction of 546 FTEE in VBA would be necessitated in fiscal year 1995 alone.*

BOARD OF VETERANS' APPEALS (BVA)

The Administration budget requests an average level of 449 FTEE and $28,977,000 to support its operation. This reflects an increase of 3 FTEE for fiscal year 1995. *Unless additional FTEE are added at the Board, a significant deterioration of timeliness in processing veterans appeals will occur.*

During fiscal year 1994 an average employment level of 446 FTEE is expected to support the operation of the BVA. During fiscal year 1993 this level was 441. During fiscal year 1993 the Board received 38,147 appeals, in addition to 21,981 appeals which were pending at the beginning of the fiscal year. Some 26,400 appeals were decided by the Board (down from 33,483 in fiscal year 1992), resulting in a pending appeals number of 33,728 at the beginning of fiscal year 1994. The average BVA response time for fiscal year 1992 was 240 days. That rose to 466 days in fiscal year 1993. The Board projects that for fiscal year 1994, the response time will increase to 725 days, and by 1995 that level could be 945 days.

Forty four percent of all appeals to the Board are now being remanded to the regional offices for readjudication, primarily to assure compliance with procedural requirements imposed by the Court of Veterans Appeals. During fiscal year 1993, 11,614 cases were remanded. Historically, prior to the advent of judicial review, remand rates of only 15 to 17 percent were the norm.

The increasing backlog of appeals pending at the Board and the corresponding increases in average response times to alarming levels must be dealt with beginning in fiscal year 1995. Section 12301 of H.R. 3400 (the Reinventing Government Package), as passed by the House during the First Session of the 103rd Congress, would remove the current statutory limit (65) on the number of Board Members. The Board must be allowed to expand its size and be provided sufficient resources to enable it to address the deteriorating situation it now faces in deciding veterans' appeals. Legislation

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ADJUDICATION OF APPEALS BY THE BOARD OF VETERANS' APPEALS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMPENSATION, PENSION, AND INSURANCE

OF THE

COMMITTEE ON VETERANS' AFFAIRS

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

May 6, 1993

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[SEAL]

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* * *

deficient in a material way under a new precedent, must be readjudicated, either by the Board or by the agency of original jurisdiction.

The Board's workload has increased in other respects. For example, cases remanded by the Court to the Board must be readjudicated and a high percentage of cases remanded by the Board to VA regional offices will be returned to BVA for final appellate adjudication. In addition, personnel once devoted primarily to preparing decisions on the merits must now be allocated to other tasks that are part of the new adjudication environment. The demand for BVA hearings at VA regional offices has steadily grown. This requires the dedication of limited resources, particularly Board member time, to the conduct of hearings and the necessary travel. Other activities that have been added since enactment of the VJRA include the processing and review of attorney fee agreements, including the payment of attorney fees from past-due benefits, assisting the Office of the General Counsel in the designation of the record on appeal to the Court, and an expanded motions practice resulting from a more formalized environment. These activities consume considerable senior staff, Board member and administrative personnel time. A special Liaison staff has been formed (7 FTE) in order to process appeals to and remands from the Court, interpret and disseminate Court decisions for BVA use, and assist the Office of the General Counsel with litigation.

The decrease in decision productivity and increase in average processing time have been directly proportional to the impact of the Court decisions overturning VA interpretations of the law. In Fiscal Year 1991, the Board issued 45,308 decisions. That number dropped to 33,483 in FY 1992. We estimate that 27,600 deci-

sions will be promulgated in FY 1993. Approximately 50 percent of these "decisions" will be determinations remanding cases to agencies of original jurisdiction for further development. Appeal receipts have decreased from 43,093 in FY 1991 to 38,229 in FY 1992. We project that we will receive 39,000 appeals in FY 1993 and that over 33,000 appeals will be pending as of the end of FY 1993. While appeal receipts have decreased from 43,093 in FY 1991 to 38,229 in FY 1992, anecdotal information from the Veterans Benefits Administration (hereinafter, "VBA") reflects that the number of Notices of Disagreement received at Regional Offices has not decreased. In fact, as the result of the projected "downsizing" of the military, it is anticipated that the veteran population and, accordingly, the number of new claims for veterans' benefits, will increase. Therefore, it appears that the reduction in appeals received is temporary and, perhaps, a reflection of the increased processing time required at the regional office level in the changing environment. It also may be expected that many of the cases remanded by the Board to the regional offices will be returned to the Board for a final determination. As over 50 percent of the Board's dispositions are remands for additional development, a considerable increase in receipts may be anticipated.

Compounding the degradation of productivity and response time resulting from the impact of judicial review are factors including the number of hearings held both in the Board's offices in Washington, D.C. and at VA regional offices. In FY 1991, the Board held 873 travel hearings and 1,502 hearings in Washington, D.C. In FY 1992, 1,258 hearings at regional offices and 1,394 hearings in Washington, D.C. were conducted. For FY 1993, it is projected that the Board will hold 2,500 travel hear-

ings and 1,000 hearings in Washington, D.C. The necessity of conducting hearings and travel time, in the case of hearings at regional offices, places additional constraints on the Board members' time. As the number of Board members currently is limited by 38 U.S.C. §7101(a) to 63, aside from the Chairman, Vice Chairman and Deputy Vice Chairmen, decision making resources are restricted. In addition, as the Board must render decisions in sections usually composed of three members, the existing law establishes an additional point of constriction in the processing of appeals. 38 U.S.C. §7102(c) and 38 U.S.C. §7103(a).

The Board generally computes timeliness of decision making in terms of "response time," which is defined as the projected number of days it would take BVA to render decisions on all currently pending appeals. The average number of decisions rendered pay day over the preceding one year period is used as the basis for making this projection. In FY 1990, response time was 152 days. In FY 1991, that figure had dropped to 139 days. In FY 1992, the data began to reflect the new environment of judicial review, as response time

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Excerpts from Brief of Appellant Edward R. Cole to the United States Court of Veterans Appeals

much responsible for his unemployability as his service-connected psychiatric disorder.

ARGUMENT

THE BOARD'S DECISION SHOULD BE REVERSED BECAUSE IT IS CONTRARY TO BOTH THE LAW AND THE EVIDENCE.

Total disability ratings are authorized for compensation purposes where a service-connected disability or combination of disabilities is less than 100% under the Schedule for Rating Disabilities but meets certain schedular prerequisites and is sufficient to produce unemployability in the individual's own circumstances. 38 C.F.R. §§3.340(a)(2), 3.341(a) (1991). Neither the existence nor the degree of any nonservice-connected disabilities will preclude a total rating for compensation purposes based upon unemployability if service-connected disabilities render the veteran unemployable: "the existence or degree of nonservice-connected disabilities . . . will be disregarded" under such circumstances. 38 C.F.R. §4.16(a).

But for its misapplication and omission of pertinent provisions of law in this case, the Board could not have arrived at its denial of the veteran's claim, and even with its misapplication of law, the Board's decision still necessarily rested on a clearly erroneous finding of fact.

A. The Board's Conclusory Finding that the Veteran Is Not Unemployable Solely Due to His Service-Connected Disabilities Followed From a Flawed Analysis in That It Did Not Take Into Account Controlling Regulatory Provisions.

It is undisputed that the veteran's service-connected PTSD is "severe" and therefore 70% disabling under the schedular criteria (R. 5, 9). The Board, however, based its denial of an unemployability rating on the conclusion that the veteran's non-service-connected obsessive compulsive personality disorder was "equally" disabling and therefore that the veteran is not "precluded from performing *all* forms of substantially gainful employment, solely as the result of his service-connected disabilities." (R. 5, 6.) Assuming for the purposes of argument that the evidence shows the veteran suffers from a personality disorder which has symptomatology equal in severity to his PTSD, the Board's decision would nonetheless be unlawful for a number of reasons.

Most obvious is the Board's summary denial based solely on the existence and degree of the purported disabling personality disorder. The Board did not "disregard" the condition for the purpose of determining whether the service-connected disabilities, predominantly PTSD, render the veteran unemployable. It went no further than disposing of the issue on the mere existence and degree of nonservice-connected disability.

Incidentally, its conclusory finding that the veteran is not precluded from all forms of substantially gainful employment also demonstrates that the Board continues to ignore the holdings of this Court that " '[a]ll types of work' as used in the BVA decision in this case is not an appropriate standard by which to determine

unemployability." *Ferraro v. Derwinski*, 1 Vet.App. 326, 331-33 (1991). "This is clearly insufficient in providing 'reasons and bases' for the decision." *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991); *see also Hall v. Secretary Health, Ed. & Welfare*, 602 F.2d 1372, 1377 (9th Cir. 1979) ("It is incumbent on the secretary at a minimum to come forward with specific findings showing that the claimant has the physical and mental capacity to perform specified jobs, taking into consideration the requirements of the job as well as the claimant's age [inapplicable here], education, and background."); *Lightfoot v. Mathews*, 430 F. Supp. 620, 621 (N.D. Calif. 1977) ("Plaintiff's capacity to perform work must be assessed in terms of her own particular pattern of ailments and abilities including, age, education work experience and impairments. This requires a finding of capacity to work which is expressed in terms of specific kinds of jobs, and not simply in terms of catch-all categories susceptible to subjective construction.").

Even if, as the Board has found, the veteran is unemployable only when the effects of PTSD and a personality disorder are both considered, the decision would nonetheless be erroneous as a matter of law. Because personality disorders are "manifested by a lifelong pattern of action or behavior," they are presumed to have existed prior to service even in the absence of evidence of preexistence. 38 C.F.R. §3.303(c) (1991). Thus, any acquired psychiatric disorder of service onset would constitute an aggravation of a preexisting psychiatric condition. Personality disorders are service-connected on the basis of aggravation in the case of "superimposed" disability during service. Op. G.C. 82-90, at 4 (1990) (see Appendix A).

When service connection is by reason of aggravation, 38 C.F.R. §3.306 (1991), no deduction is made for the degree of disability existing at enlistment if the disability is currently total or if the degree of disability at entrance is not ascertainable in terms of the schedule. 38 C.F.R. §§3.322, 4.22 (1991). Both conditions apply here: No degree of personality deviation was found during service, and even if it were, no deduction is made in the case of total disability. Moreover, in any case of a service-connected psychiatric disorder superimposed upon a personality disorder, there is to be no attempt to apportion the disability, and the entire condition is to be rated as service connected. 38 C.F.R. §4.127 (1991). While §4.127 expressly includes only superimposed psychotic disorders under its provisions, the VA has made it clear that this equally applies to neurotic disorders as well:

> [P]roperly diagnosed *superimposed* psychotic *or neurotic* disorders developing after enlistment are disabilities within the meaning of the Schedule and are to be rated. The personality disorder and superimposed disorder will be evaluated as one disorder, the basis being inability to separately distinguish the effect of the personality disorder and superimposed neurosis or psychosis.

TG 21-75-1, pt. III, 47-3.[2] (Emphasis in original.) (See Appendix B.)

A lack of consistency is evidence of arbitrariness. *E.g., Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978) ("Although an

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[2]This guide for training rating boards is not regulatory as such, but it nonetheless articulates established agency policy on the proper construction and application of §4.127, which is controlling authority.

agency may change its policy as it determines is in the public interest [citation omitted], when, as here, it announces no principaled reason for such a reversal, its action is arbitrary and the courts should be quick to so declare. We have previously held that 'an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored'."). Moreover, because the Board has no rulemaking authority, it can not amend rules. *See* 38 U.S.C.A. §§501, 511, 512 (West 1991) (indicating the Secretary has been authorized to subdelegate his adjudicatory powers but not his rulemaking authority). Thus, the Board is bound by §4.127, 38 U.S.C.A. §7104(c) (West 1991), and the Secretary's instructions regarding its construction. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (holding that agencies must follow their own internal procedures even when not published in the Federal Register).

Therefore, the Board can not discount the veteran's overall psychiatric disability because of any proportion thereof nonservice-connected disability

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Excerpt from Reply Brief of Appellant Edward R. Cole to the United States Court of Veterans Appeals

By raising this issue, the Secretary is making his own assignments of error, an action tantamount to the Secretary's appealing or cross-appealing the Board's decision, and an obvious violation of 38 U.S.C.A. §7252 (West 1991). If the case were to be remanded on the Secretary's allegations of error rather than the veteran's, the inescapable effect will have been that the action was the result of the Secretary's appeal.

The Board made absolutely no suggestion or finding that the veteran's respiratory problem was a factor in bringing about the termination of his employment. It is not the Secretary's place to invent extraneous issues at this stage of the proceedings to divert the appeal away from the points raised by the veteran. Further, this is clearly an effort to find after-the-fact support for the Board's denial.

If there were a valid reason to explore the effect, if any, of the veteran's emphysema in bringing about his unemployability, the current record is sufficient. Perhaps it was because the record shows that the veteran's emphysema had no role in bringing about his unemployability that the Board was silent on this point.

The record shows the veteran became too disabled to work in December 1987 because of his service-connected post-traumatic stress disorder (PTSD). (R. 344-45, 347.) There was no presence or history of respiratory problems at that time. Records from 1966 show the lungs clear to auscultation and percussion (R. 85). On

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No. 93-1765

In the Supreme Court of the United States

OCTOBER TERM, 1994

EDWARD R. COLE, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction based upon its determination that the Court of Veterans Appeals' remand order did not fall within the collateral order exception to the final decision rule.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)	4, 7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	4, 7
Digital Equipment Corp. v. *Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994)	4, 7, 8
Shalala v. *Schaefer*, 113 S. Ct. 2625 (1993)	6
Sullivan v. *Finkelstein*, 496 U.S. 617 (1990)	5, 6, 7
Travelstead v. *Derwinski*, 978 F.2d 1244 (Fed. Cir. 1992)	5, 6

Statutes and regulations:

28 U.S.C. 1291	6
38 U.S.C. 7252(a) (Supp. IV 1992)	7, 8, 9
38 U.S.C. 7292(a) (Supp. IV 1992)	3
42 U.S.C. 405(g)	6

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-7a) is unpublished, but is noted at 19 F.3d 39 (Table). The order of the Court of Veterans Appeals (Pet. App. 8a-9a) is unpublished, but the decision is noted at 5 Vet. App. 169 (Table). The decision of the Board of Veterans' Appeals (Pet. App. 10a-17a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1994. The petition for a writ of certiorari was filed on May 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a veteran who served on active duty from August, 1950, to March, 1952. Pet. App. 4a, 10a. The Department of Veterans Affairs (VA) has assigned petitioner a combined disability rating of 70% based upon two service-connected disabilities: a gunshot wound to the right leg and post-traumatic stress disorder (PTSD). *Id.* at 4a, 12a, 19a-20a. On October 15, 1990, petitioner applied to the VA for a total disability rating, *id.* at 18a, 25a, but on December 6, 1990, the VA regional office in Detroit, Michigan denied the application. *Id.* at 10a, 25a.

2. Petitioner appealed the VA's decision to the Board of Veterans' Appeals (BVA or Board). On April 3, 1992, the BVA affirmed the VA's decision, *id.* at 10a-17a, concluding that "[u]nemployability due to [petitioner]'s service-connected disabilities has not been demonstrated." *Id.* at 12a; see also *id.* at 11a, 16a. Because petitioner suffers from both service-connected PTSD and nonservice-connected obsessive compulsive personality disorder, *id.* at 14a, the Board concluded that "the objective clinical documentation of record does not establish that [petitioner] is effectively precluded from performing *all* forms of substantially gainful employment, solely as the result of his service-connected disabilities. Rather, the medical evidence reveals that he is at least equally limited by his nonservice-connected psychiatric disorder." *Id.* at 15a.

3. Petitioner appealed the BVA's decision to the Court of Veterans Appeals (CVA). Pet. App. 83a-87a. Among other things, petitioner argued that the BVA had failed to provide adequate reasons and bases for its "conclusory finding" that petitioner is not precluded from all forms of substantially gainful employment. *Id.* at 84a. By order dated April 13, 1993, the CVA vacated

the BVA's decision and remanded "for reasons set forth in the Secretary of Veterans Affairs' brief." Pet. App. 8a.[1] In his brief before the CVA, the Secretary took the position that a remand was necessary because the BVA had "failed to develop in appropriate detail the reasons or bases upon which its decision was grounded as required by *Gilbert* v. *Derwinski*, 1 Vet. App. 49 (1990)." Pet. App. at 30a.[2]

4. Petitioner sought review of the CVA's decision in the court of appeals, arguing primarily that the CVA's remand order was improper because it was done at the behest of the Secretary. Pet. App. 5a. On February 4, 1994, the court of appeals dismissed the appeal on the ground that the CVA's order remanding to the BVA was not a final decision within the meaning of 38 U.S.C. 7292(a) (Supp. IV 1992), the statute authorizing appeals from the CVA to the Federal Circuit. Pet. App. 3a-7a. In so doing, the court rejected petitioner's argument that the remand order fell within the "collateral order exception" to the final judgment rule because the remand order did not resolve any issue completely separate from the merits of petitioner's claim. *Id.* at 6a-7a.

ARGUMENT

1. Petitioner does not contend that the CVA's remand order to the BVA is a final decision; nor did he do so in

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[1] At the same time, the remand order expressly "permit[ted] [petitioner]'s counsel to present any issues deemed necessary for the proper readjudication of [petitioner]'s claim." Pet. App. 8a.

[2] Specifically, the Secretary pointed out that the BVA had failed to set forth the evidentiary basis for its conclusion that petitioner's nonservice-connected personality disorder contributed to his unemployability. Pet. App. 29a. The Secretary also noted that the BVA had failed to analyze the possible impact of emphysema upon petitioner's vocational ability. *Ibid.*

the court of appeals. Pet. App. 5a-6a. Instead, he argues that the remand order is appealable under the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In *Cohen* the Court recognized that there exists a

> small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546. Subsequently, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), this Court set forth a three-part test for determining whether a decision falls within the "narrow ambit"[3] of the *Cohen* rule:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

437 U.S. at 468. Accord *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-1996 (1994). The Court has "described the conditions for collateral order appeal as stringent" and has "repeatedly stressed that the 'narrow' exception should stay that way." *Id.* at 1996.

The court of appeals correctly determined that the remand order in this case "cannot be characterized as

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[3] *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 114 S. Ct. 1992, 1994 (1994).

completely separate from the merits of the action," Pet. App. 7a, and hence failed the second prong of the *Coopers & Lybrand* test.[4] As the court of appeals explained, "the CVA's remand order was entered for the express purpose of requiring the Board to supplement the evidentiary record to permit meaningful appellate review of the Board's decision on the merits." Pet. App. 7a. The order thus involved the merits of petitioner's claim and was not completely separate from them.

Petitioner erroneously claims that the court of appeals "held that a remand order could *never* satisfy the criteria for an immediate appeal under the collateral-order exception." Pet. 8 (emphasis added). In fact, the court of appeals recognized that a remand order might be appealable under the collateral order doctrine; however, the court found the doctrine inapplicable to the order in this case. See Pet. App. 6a-7a. Petitioner's broader assertion that the Federal Circuit applies a rule that "remand orders are * * * per se exempt from review," Pet. 10, is also incorrect. Indeed, the Federal Circuit has held in at least one case that a remand order from the CVA to the BVA was immediately appealable. See *Travelstead* v. *Derwinski*, 978 F.2d 1244, 1247-1249 (Fed. Cir. 1992).

Petitioner also argues (Pet. 10) that this case is identical in all relevant respects to *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), in which an immediate appeal of a district court's remand order was allowed. In *Finkelstein*, a widow's application for Social Security disability benefits was denied by the Secretary of Health and Human Services (HHS) on the ground that, under

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[4] The court of appeals assumed, *arguendo*, the satisfaction of the first and third prongs of the *Coopers & Lybrand* test, Pet. App. 6a, as do we.

HHS regulations, her impairment was not of sufficient severity to qualify as a disability; the widow then sought judicial review. The district court, while agreeing that the widow's impairment did not qualify as a disability under HHS regulations, nonetheless remanded for fact-finding regarding her inability to engage in gainful activity. This Court held that the remand order was a "final decision" under 28 U.S.C. 1291 and 42 U.S.C. 405(g) because the district court had set aside "the Secretary's final determination that [the widow] was not entitled to benefits * * * and finally decided that the Secretary could not follow his own regulations in considering the disability issue." *Finkelstein*, 496 U.S. at 625.

The remand order at issue here is not "of the type entered by the District Court in [*Finkelstein*]." *Finkelstein*, 496 U.S. at 623. Cf. *Travelstead*, 978 F.2d at 1249 ("The principal directive of *Finkelstein* is that remands are not all of the same nature."). The key fact in *Finkelstein* was that the district court's order had "essentially invalidated," 496 U.S. at 624, the HHS regulations under which the government had rejected the widow's claim for benefits. See also *id.* at 619 ("We granted certiorari to decide whether the Secretary * * * may immediately appeal a district court order effectively declaring invalid regulations that limit * * * disability insurance benefits and remanding a claim for benefits to the Secretary for consideration without those restrictions."); *Shalala* v. *Schaefer*, 113 S. Ct. 2625, 2635 (1993) (Stevens, J., concurring in the judgment). By comparison, the CVA's order in this case did not have the effect of voiding a legal rule relied upon by petitioner pertaining to the merits of his claim, but merely remanded due to the BVA's failure adequately to explain the reasons and bases for its decision. Furthermore, in

Finkelstein the district court set aside a decision *favorable* to the party seeking immediate appeal; petitioner here wishes to appeal an order vacating a decision *adverse* to him.[5]

2. Petitioner argues (Pet. 10-11) that the CVA's remand order constituted a rejection of his argument that 38 U.S.C. 7252(a) (Supp. IV 1992) bars the CVA from remanding to the BVA at the behest of the Secretary of Veterans Affairs and that he is entitled to appeal that implicit "ruling" under the collateral order doctrine. It is not clear, however, that the remand here "conclusively determine[d] the disputed question," *Coopers & Lybrand*, 437 U.S. at 468, since the CVA did not rule expressly on petitioner's Section 7252(a) argument. More fundamentally, even if the remand order did violate Section 7252(a), it surely cannot be said that the issue of the remand's validity is "too important to be denied review." *Cohen*, 337 U.S. at 546. Remanding to the BVA

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[5] Petitioner—who "apparently concede[d]" in the court below that the remand order was not final, Pet. App. 5a, and does not contend otherwise in this Court—bases his argument on the collateral order doctrine. Pet. i, 8-10. The remand order in *Finkelstein* was held to be appealable, however, not because it was a collateral order, but because it was a final decision. The final decision rule and the collateral order doctrine are closely related, cf. *Digital Equipment Corp.*, 114 S. Ct. at 1995 ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in [28 U.S.C.] § 1291, but as a 'practical construction' of it, *Cohen*, *supra*, at 546."), and an analysis of the appealability of a remand order will often yield the same conclusion regardless of which doctrine is applied. Cf. *Finkelstein*, 496 U.S. at 632 (Blackmun, J., concurring in the judgment) (expressing the view that the remand was appealable, not because it was a final decision, but because it was a collateral order). *Finkelstein* is therefore germane to a remand's appealability under the collateral order doctrine.

left petitioner no worse off than he was before remand because the BVA *denied* petitioner's claim in the first instance. If anything, the remand was a windfall to petitioner because it gave him a second chance for a favorable administrative decision.[6]

Petitioner argues (Pet. 11-14) that the remand order is detrimental to him because it will postpone final resolution of his claim. Delay, however, is an inevitable incident of remands and is not an independent reason justifying immediate appealability. See *Digital Equipment Corp.*, 114 S. Ct. at 1996 (appealability "is to be determined * * * without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision") (internal quotation marks, citations, and brackets omitted). Petitioner also attempts (Pet. 11) to liken his Section 7252(a) argument to a double jeopardy or immunity claim, but this Court has rejected attempts to expand the category of immediately appealable collateral orders by analogy to such claims. See *Digital Equipment Corp.*, 114 S. Ct. at 1996-1999.

In any event, petitioner's argument that Section 7252(a) bars the Secretary from seeking a remand is incorrect. Citing no authority other than the text of Section 7252(a) (which we set out in the margin[7]), petitioner asserts that the statute gives him "the

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[6] Furthermore, if on remand the BVA accepts petitioner's claim, 38 U.S.C. 7252(a) (Supp. IV 1992) will bar the Secretary from appealing the decision. See note 7, *infra*.

[7] "The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. 7252(a) (Supp. IV 1992).

exclusive right to define the issues on appeal to the CVA." Pet. 11; see also Pet. App. 88a. The express terms of Section 7252(a), however, forbid the Secretary only from "seek[ing] review" of a BVA decision, not from arguing on a veteran's appeal that it is appropriate to remand the case, a disposition expressly authorized by Section 7252(a)'s third sentence. See note 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Several points raised in respondent's opposition to the petition for certiorari call for a brief reply.

1. Respondent's assertion that the third sentence of 38 U.S.C. § 7252(a) (1988) permits him to independently argue for remand (Br. in Opp. 9) is incorrect. Section 7252(a) grants the Court of Veterans Appeals (CVA) jurisdiction to review decisions of the Board of Veterans' Appeals (Board), to the extent such decisions are challenged by parties other than respondent, and sets out the

nature of the remedies available. Although the second sentence of the statute expressly forbids respondent to "seek review of any such decision" appealed to the CVA by "a person adversely affected," 38 U.S.C. § 7266(a) (1988), respondent argues that the third sentence should be read in isolation and somehow erases the second. The Court should presume that Congress does not write such internally inconsistent statutes, *Fugere v. Derwinski,* 972 F.2d 331, 336 (Fed. Cir. 1992) (citing *Markham v. Cabell,* 326 U.S. 404, 411 (1945)), and "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 112 S.Ct. 1146, 1149 (1992).

Respondent argues (Br. in Opp. 9) that the express terms of Section 7252(a) do not forbid him "from arguing on a veteran's appeal that it is appropriate to remand the case. . . ." However, that is not what respondent has done. Petitioner's appeal to the CVA raised only two issues of law and respondent did not seek remand on either of these issues. Pet. App. 83a-87a. Instead, in violation of Section 7252(a), respondent raised a new issue, i.e., inadequate reasons or bases for a factual finding,[1] and argued for remand solely on that basis. Section 7252(a) gives the type of explicit guarantee that a new trial will not occur on respondent's issues, in this case a remand for "readjudication," Pet. App. 8a, that the

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[1] Even if the Board's decision had been unclear with respect to a factual determination, the Federal Circuit has held that the interpretation of a Board decision "is unquestionably a matter of law," *Livingston v. Derwinski,* 959 F.2d 224, 226 (Fed. Cir. 1992), over which the CVA exercises plenary jurisdiction. *Machado v. Derwinski,* 928 F.2d 389, 391 (Fed. Cir. 1991). There is no set of reasons or bases which can justify a legal error in the Board's decision.

Court has found will support an immediate appeal. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (stating that "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur"). By raising a new issue before the CVA, respondent transformed petitioner's appeal into his own in violation of Section 7252(a). Section 7252(a) denies the CVA jurisdiction to remand based on respondent's assignments of error.

2. Respondent's statement that the CVA's remand order was a windfall to petitioner (Br. in Opp. 8) is incorrect. Decisions by the Board are final, 38 U.S.C. § 7104(a) (1988), unless appealed to the CVA, 38 U.S.C. §§ 7252(a), 7266(a). The law prohibits respondent from "seek[ing] review of any such decision," 38 U.S.C. § 7252(a), in addition to forbidding him from filing a notice of appeal. 38 U.S.C. § 7266(a). Board decisions are therefore absolutely final as to respondent. *Id.*; 38 U.S.C. § 7252(a). Having to endure the burden of remand proceedings, solely on respondent's request, while petitioner's properly presented appeal is ignored, is no "windfall."

Petitioner invoked the CVA's mandatory jurisdiction, 38 U.S.C. §§ 7252(a), 7266(a), to review two legal issues. Pet. App. 83a-87a. Neither was addressed. Pet. App. 8a. Rather, the CVA remanded[2] on an issue raised solely by respondent. *Id.* The remand violated a statutory right

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[2]Respondent is incorrect (Br. in Opp. 8) in stating that delay does not justify immediate appealability in this case. The delay occasioned by remand results from the deprivation of the exclusive right granted to petitioner by Congress to determine the issues before the CVA. The issue is not the length of the delay, but rather whether any delay is permissible for this illegal purpose.

conferred by Congress and not the type of private contractual right the Court has found will not support an immediate appeal. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 2004 (1994).

Respondent cites *Digital Equipment Corp.* for the proposition that collateral order review is a narrow exception to the final order rule and should stay that way. Br. in Opp. 4. Unlike 28 U.S.C. § 1291 (1982), which specifically excludes the United States Court of Appeals for the Federal Circuit, there is presently no similar "practical construction," *Digital Equipment Corp.*, 114 S.Ct. at 1995, of 38 U.S.C. § 7292 (1988), the statute at issue in this case. While Section 1291 expressly imposes a finality requirement, Section 7292 states that review is available after a decision is "entered." The CVA entered a decision when it remanded because it expressly did "not retain jurisdiction." Pet. App. 8a. If the Court finds that review is available under Section 7292 in this case, that decision need not necessarily expand collateral order review under Section 1291.

3. Respondent incorrectly asserts (Br. in Opp. 7) that it is unclear whether the CVA conclusively determined the disputed question because that court "did not rule expressly on petitioner's Section 7252(a) argument." This statement begs the question. It is indisputable that the CVA "remanded for readjudication for reasons set forth in the Secretary of Veterans Affairs' brief. . . ." Pet. App. 8a. The reasons advanced by the Secretary were exclusively that "the [Board] failed to provide adequate reasons and bases for its determination to deny Appellant's claim. . . ." Pet. App. 29a. It is also beyond dispute that petitioner argued to the CVA that respondent's urging a remand on that basis was "tantamount to the Secretary's appealing or cross-appealing the Board's

decision" in violation of Section 7252(a). Pet. App. 88a. That the CVA conclusively determined that Section 7252 does not prohibit a remand at the sole request of respondent could not be more clear, otherwise the CVA could not have remanded as it did in this case.

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